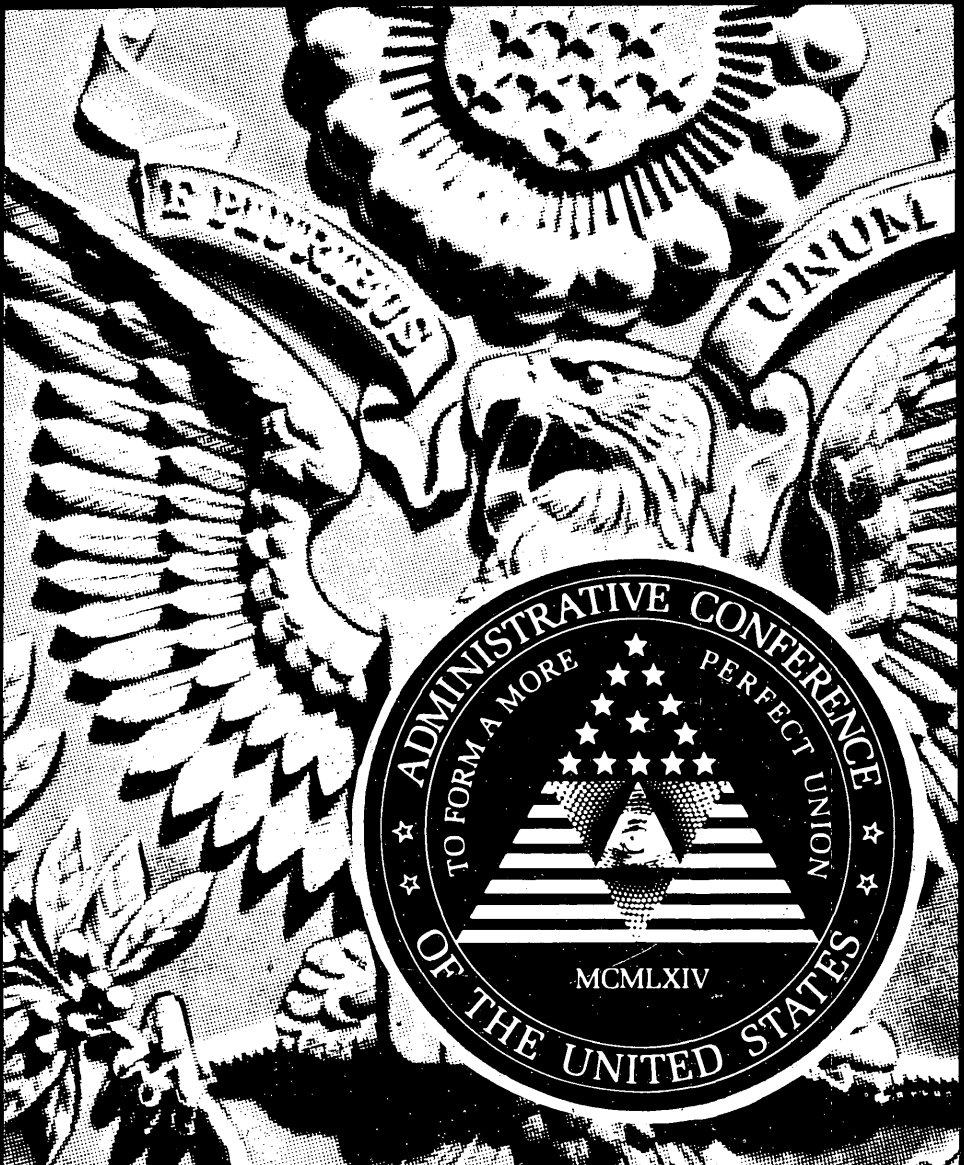


# 1988 ANNUAL REPORT



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of the United States



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# LETTER OF TRANSMITTAL

Administrative Conference of the United States  
Office of the Chairman  
Washington, D.C.

August 1989

*To the President and the Congress of the United States:*

I have the honor to transmit herewith the 1988 Report of the Administrative Conference of the United States.

This report describes the significant activities of the Administrative Conference for the 12-month period from January 1, 1988 through December 31, 1988.

Respectfully,

Marshall J. Breger  
*Chairman*

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## CHAIRMAN'S RETROSPECTIVE

### The Administrative Conference: Highlights of the First 20 Years

President Lyndon Johnson swore in the first Chairman of the Administrative Conference, Professor (now Judge) Jerre Williams, on January 25, 1968 stating:

We needed a forum for the constant exchange of ideas between the agencies and the legal profession and the public.

We want the Administrative Conference to be the vehicle through which we can look at the administrative process and see how it is working and how it could be improved and how it could best serve the public interest.<sup>1</sup>

With this as its *raison d'être*, the Administrative Conference of the United States has fulfilled its mandate for the last 20 years. Launched to encompass as its province the entire world of government, the Conference has become an indispensable monitor of procedural fairness and efficiency. Like a satellite, if the Conference were ever to lose power and fall from its orbit, I have little doubt that a new one would soon have to be launched.

In its first 20 years the Conference has had a real effect on the workings of the federal government. While some of its accomplishments may appear prosaic they add up to a significant record of achievement.

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1. From *Public Papers of the Presidents*, Lyndon B. Johnson, 1968-69, Volume 1, at page 68.

## **Open Government**

Perhaps the first Conference recommendation that significantly changed government behavior was its 16th recommendation in 1969. Later renumbered Recommendation 69-8, it bears the title, "Elimination of Certain Exemptions from the APA Rulemaking Requirements." This recommendation urged that Congress modify the Administrative Procedure Act (APA) to eliminate the provision allowing agencies to dispense with notice-and-comment procedures when they propose rules relating to "public property, loans, grants, benefits or contracts." This so-called "proprietary exemption" may have made sense in 1946, when the Administrative Procedure Act was enacted, but by 1969 many important federal programs significantly affecting private rights (including Social Security) fell within that exemption. The recommendation also wisely urged agencies to voluntarily eschew relying on that exemption without waiting for legislative action. Congress has never acted, but shortly after the recommendation was adopted, HEW Secretary Elliott Richardson issued an order stating that in light of the Conference action, the Department would henceforth refrain from invoking the proprietary exemption. Most other agencies and departments followed suit and many proposed rules concerning grants, benefits, and contracts were thereby opened for public comment.

The Conference has been at the forefront of urging and refining the ideal of open government in other ways. In 1971 the Conference studied the 5-year-old Freedom of Information Act, identified numerous areas for improvement, and suggested specific changes in the Act. With the Justice Department's support, this recommendation formed the basis for the 1974 strengthening of the Act. Further refinements in the 1986 amendments to the Act followed Conference recommendations adopted in the early 1980s.

## **Civil Penalty Procedures**

One of the Conference's most influential recommendations, "Civil Money Penalties as a Sanction" (Recommendation 72-6) was issued in 1972. The Conference urged Congress and agencies to review their enforcement powers to see whether flexible civil money penalties could be substituted for (or added to) more draconian criminal sanctions or license revocation authority. The Conference study also described problems with the traditional civil penalty statute that required agencies to forward cases to the Department of Justice for collection in federal district court. The Conference developed a model alternative statute incorporating an on-the-record hearing before an administrative law judge (ALJ), followed by judicial review in the court of appeals, for con-

testing civil penalties. This “agency imposition” model, as opposed to the traditional “court collection” model was upheld by the Supreme Court in *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977). The model has been used successfully in dozens of laws since 1972 and is now the preferred method for imposing civil money penalties.

## **Large-Scale Studies Requested by Congress**

In 1975 at the request of a Congressional committee, the Conference completed the first of its mega-studies. The resulting report and recommendations on IRS procedures helped inform Congress not only about IRS procedures, but also about what the IRS’ relations with taxpayers would be like for years to come. Many of the recommendations on the audit and settlement process, collection of delinquent taxes, civil penalties, the IRS summons power, taxpayer services and complaints, and tax reform confidentiality were enacted into law.

This experience paved the way for another Congressionally-mandated, large-scale study of the Federal Trade Commission’s (FTC) Trade Regulation Rulemaking procedures. Under the 1975 Federal Trade Commission Improvement Act, the Commission was required to engage in “hybrid” rulemaking, a format that adds such requirements as oral hearings, opportunity for cross examination and rebuttal, and judicial review under a substantial evidence standard to the notice-and-comment requirements for “informal rulemaking” under Section 553 of the APA. The Conference extensively studied these procedures and found they had not worked very well at the FTC. In addition to the many particulars (found in Recommendations 79-1, 79-5, and 80-1), the Conference urged Congress not to require hybrid rulemaking procedures in the future--and to leave such additional requirements to agency discretion.

## **Legislative Successes**

One of the Conference’s most significant legislative achievements involved how citizens challenge agency action in court. Indeed, Judge Carl McGowan wrote in 1984 that “many would consider this to be perhaps the Conference’s greatest achievement.”<sup>2</sup> A 1969 Conference study showed that the government was successful in interposing various “technical defenses” in suits seeking relief against federal agency action. Various rules concerning venue, the proper naming of parties defendant, and the \$10,000 amount-in-controversy requirement were trapping unwary plaintiffs. Even more important, although the old doctrine of sovereign immunity had been legislatively eliminated in tort and contract claims, it was still used as a bar in these so-called nonstatutory suits. The Conference

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2. McGowan, *The Administrative Conference: Guardian and Guide of the Regulatory Process*, 53 G.W.U. L. Rev. 67, 71 (1984-85).

recommended that these archaic rules be changed (Recommendations 68-7, 69-1, 70-1).

Initially the Department of Justice (DOJ) opposed the recommendations, but this changed in 1975 when former Conference Chairman, Antonin Scalia, joined the Department as Assistant Attorney General in charge of the Office of Legal Counsel. With DOJ's opposition removed, Congress passed the Conference's bill in 1976 (Pub. L. 94-454) sweeping away years of inconsistencies and anomalies in the doctrines of judicial review.

A similar legislative achievement occurred in 1988 when Congress enacted Public Law 100-236, which eliminated a remaining anomaly embedded in the judicial review statutes: races to the courthouse. Under then prevailing venue rules, the first appeal filed in a court of appeals from an agency action determined which court would have jurisdiction over all appeals from that action. Because of perceived differences in the various circuits, parties often raced to be the first to file in the circuit of their choice. Those races were often ludicrous and expensive and, even worse, required an extra round of litigation simply to determine the winner. The Conference's recommended solution was, in effect, a lottery among all filers--to be administered by the court administrators. This amazingly simple solution finally made it all the way through the legislative process in 1988, ending the days of walkie-talkies at the Office of the Federal Register.

## **Consultation Requirements**

In 1976 with the passage of the Government in the Sunshine Act, Congress assigned the Conference consultative responsibilities as follows: each agency subject to the Act should promulgate implementing regulations, "following consultation with the Office of the Chairman of [ACUS]." Through meetings and correspondence this legislative directive was carried out seriously and expeditiously. Building on this effort, in 1977 the Office of the Chairman published its influential *Interpretive Guide to the Sunshine Act* used throughout government and later cited as an authority by the Supreme Court.

This experience was replicated in 1980 when Congress included a similar requirement in the Equal Access to Justice Act. This statute provides for the awarding of attorneys' fees to certain parties who successfully litigate against the federal government unless the government can demonstrate that its position was substantially justified. Again the Chairman's Office held a series of meetings with the agencies that were affected and, this time, produced a set of model implementing rules that were adopted by almost all affected agencies. The Conference continues to monitor developments under the Act. In 1986 when the Act was reauthorized and amended the Conference issued a supplemental set of model rules.

## Ex Parte Communications in Rulemaking

In response to rapidly changing legal doctrine following the D.C. Circuit Court of Appeals' decision holding that *ex parte* (off-the-record) comments to agency decisionmakers during informal rulemaking were inappropriate, the Conference quickly set up a special committee to consider the issue. The Committee formulated Recommendation 77-3, "Ex parte Communication in Informal Rulemaking Proceedings." The recommendation opposed a strict prohibition against private oral or written communications in informal rulemaking because of the nature of the process—that there are many interested persons and sources of information not easily identifiable in advance. Recognizing the widespread demand for open government and the needs of reviewing courts to evaluate the rulemaking record, however, the recommendation urged that such written communications, received after the notice of proposed rulemaking stage, be placed in the record and that agencies strive to place summaries of private oral comments in the record.

A few years later the Conference studied analogous concerns arising from intragovernmental communications in informal rulemaking (Recommendation 80-6) and again urged against prohibiting such communications so long as written and oral communications containing material factual information (as distinct from indications of governmental policy) were placed in the public file.

The D.C. Circuit relied heavily on these two recommendations in the landmark case in this area of the law, *Sierra Club v. Costle*, 657 F. 2d 298 (1981), which recognized the need for flexibility and informality in notice-and-comment rulemaking while it also safeguarded the ability of interested persons to reply effectively to information presented through *ex parte* contacts. Moreover, most agencies have adopted policies or procedures to regulate off-the-record contacts in rulemaking. The Conference's recommendation in this area produced stability in a very confusing and heavily litigated area of administrative law and agency practice.

## Negotiated Rulemaking

The Conference's negotiated rulemaking initiative, Recommendation 82-4, "Procedures for Negotiating Proposed Regulations," can truly be called a seminal breakthrough in the administrative process. The Conference recognized that "informal" rulemaking too often had become both the dominant form of agency policymaking and, consequently, a battleground with delays at the agency level and almost certain litigation in the courts. Believing that there must be a better way, a means for reaching consensus at an earlier stage was sought. Thus, the concept

of negotiated rulemaking ("reg-neg" for short) was born. In Recommendation 82-4, procedures for bringing together interested parties prior to the notice of proposed rulemaking were suggested. Attention was paid to the requirements of the Federal Advisory Committee Act and the Administrative Procedure Act. Suggestions for achieving consensus were made--and agencies were urged to experiment. The Environmental Protection Agency and the Department of Transportation among other agencies quickly tried the suggested reg-neg procedures and their initial successes stimulated the interest of other agencies.

In 1985 the Conference evaluated reg-neg to date, suggested some refinements (Recommendation 85-5), and renewed its call for agency experimentation. The results continued to be very encouraging and there have been more than a dozen significant successful reg-negs. Legislation to further stimulate agency use of reg-neg passed the Senate in 1988 and is expected to receive serious consideration in the 101st Congress.

## **Transition Team Code-of-Conduct**

Although Conference endeavors usually do not result in instant gratification, a recent recommendation calling for the establishment of a code of ethical conduct for presidential transition workers was an exception. The genesis of this recommendation was a working conference sponsored in March 1988 at which 40 government officials and ethics experts convened to discuss current issues in government ethics. One area of consensus that emerged was that the growth and importance of presidential transitions had created potential conflict-of-interest and access problems heretofore unaddressed.

With Congressional support, the Conference quickly developed, and 3 months later adopted, proposed standards as Recommendation 88-1, "Presidential Transition Workers' Code of Ethical Conduct." The general support of both presidential campaigns was sought and soon after the election President-elect Bush relied heavily on the recommendation when he issued his Memorandum of Transition Standards of Conduct. The Conference is confident this effort will remain the standard for future presidents-elect.

## **Summary**

This retrospective reflects only a few high points of Conference activities over the past 20 years. Many other fine achievements could easily be mentioned among our 100-plus recommendations and numerous publications. Of course, I would be remiss in not giving credit where

it is due--to my very distinguished group of predecessors as Chairman: Judge Jerre Williams, Dean Roger Cramton, Justice Antonin Scalia, Professor Robert Anthony, Reuben Robertson, Esq., and Chief Judge Loren Smith. I think they would agree that the continuing excellence of the Conference membership and staff has made all our jobs easier.

This record of accomplishment in the last 20 years gives the Conference a very firm foundation to address the major problems of the 1990s: the graying of America (and the resulting health care regulation issues), competitiveness (international trade issues), the litigation explosion (and the consequent need for better dispute resolution), computerization of the workplace, revolution in the financial services industry, biotechnology, a new wave of immigrants, and many more.

The substantive issues presented by these problems are assuredly difficult and they rightfully receive the most attention from our policymakers. But, inevitably, the policy issues are resolved one way or another and the next question is how to create the necessary procedures. To get help answering these questions, policymakers will do as they have done in the past: pick up their phone, word processor, or fax to call the Conference. The last 20 years have been productive, and I believe that over the next 20, by the year 2009, the Chairman of the Conference will be able to catalog a new list of accomplishments occasioned by those requests.



*Conference Chairman Marshall J. Breger presiding at plenary session.*



*Chairman Breger and U.S.-Canada Free Trade Agreement Committee Chairman Victor G. Rosenblum studying administrative procedures of the Free Trade Agreement.*

## INITIATIVES

The Administrative Conference continued its role as a major proponent of research in the field of administrative law. As a key force behind the generation and dissemination of ideas and conclusions about administrative law issues, the Conference's areas of interest are many and varied. With Conference sponsorship, the examination of many key areas of administrative procedure was possible.

Productivity in 1988 included a special plenary session on claims against savings receiverships and development of ethics laws for transition team members and training programs in alternative dispute resolution. The broad scope of the Conference's work included studies and recommendations on using computers to acquire and release information and agency use of settlement judges.

## BANKING REGULATION

The Special Committee on Financial Services, chaired by Kenneth J. Bialkin, of Skadden, Arps, Slate, Meagher & Flom, began FY 1988 with a review of the Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies, based on a study by Professor Michael P. Malloy, of Fordham University School of Law. Recommendation 87-12, largely based on Professor Malloy's report, was adopted December 18, 1987. It called for the bank regulatory agencies to take the following actions to improve their formal adjudicatory processes, with respect to regulatory enforcement actions:

1. The agencies should develop, so far as feasible, a uniform set of rules of practice and procedure for formal adjudications, including more explicit provisions covering prehearing practice and discovery rules and the receipt of evidence.
2. The agencies should make available through regular publication, or other accessible means of dissemination, the appropriately redacted decisions and accompanying opinions issued in formal enforcement adjudications.

3. The agencies should supplement and periodically clarify enforcement policies set forth in adjudicative opinions by regularly articulating their enforcement policies through rules of general applicability (including interpretive rules) and policy statements.

4. The agencies, in consultation with the Office of Personnel Management, should consider the advisability of an arrangement by which a pool of administrative law judges could handle all bank regulatory agencies' enforcement adjudications required to be conducted according to the Administrative Procedure Act, and if so, should explore ways to develop such an arrangement.

5. The agencies should explore, in their circumstances, the utility of establishing a formal or informal procedure to allow targets of investigations an opportunity to file a submission with the appropriate agency official before official action is taken to initiate an enforcement proceeding.

Conference staff briefed Congressional staff members about the study. Recommendation 87-12 was substantially endorsed by the House Committee on Government Operations, in its report on "Combating Fraud, Abuse, and Misconduct in the Nation's Financial Institutions: Current Federal Efforts Are Inadequate" (House Report 100-1088, October 13, 1988, 86-90).

The Committee then turned to a study by Cornell University Law School Professor Alfred C. Aman, Jr., on "Implementing the Bank Holding Company Act: the Adjudicatory Procedures and Informal Bargaining Processes of the Federal Reserve Board." The study became the basis for Recommendation 88-3, which was adopted June 9, 1988, and called on the Board of Governors of the Federal Reserve System to take the following actions with respect to the Fed's handling of applications under the Bank Holding Company Act:

1. When acting on such applications, the Federal Reserve Board should by regulation provide that only receipt of information of a highly significant nature pertaining to the application will be deemed to warrant reopening an applicant's file, thereby deferring the date by which the Fed must act finally on the application.

2. Conditions established by the Fed regarding applications and voluntary commitments offered by applicants should be unambiguous and reasonably related to an articulated policy of the Federal Reserve Board. Voluntary commitments, when offered by applicants, should,

consistent with the Freedom of Information Act, ordinarily be made part of final orders of the Board. Moreover, the Board should, from time to time, summarize these commitments and publish and disseminate these summaries.

The Committee concluded the year with its review of a report by Professor Lawrence G. Baxter, of Duke University School of Law, on "Life in the Administrative Track: Administrative Adjudication of Claims Against Savings Institution Receiverships." Recommendation 88-8, based on the report, was adopted September 16, 1988, and called for the following:

1. Congress should determine whether disputes over claims filed against thrift receiverships are better decided by the Federal Home Loan Bank Board (FHLBB) in an administrative adjudication process (coupled with judicial review) or by the judiciary through *de novo* resolution in state or federal courts (with or without a prior administrative claims review step at the FHLBB).

2. If Congress does determine that an administrative adjudication process is the more desirable approach, it should clarify the FHLBB's statutory authority by providing for an FHLBB adjudicative process along the lines set forth in Recommendation 88-8 (see Appendix E, page 99).

The Committee also began its study of a report by Professor Jonathan R. Macey of Cornell University Law School and Professor Geoffrey P. Miller of the University of Chicago Law School, of "Bank Failures, Risk Monitoring, and the Market for Bank Control," as well as procedural aspects of the reform of the savings and loan industry.

## GOVERNMENT ETHICS

The adequacy of laws designed to ensure ethical conduct by federal government officials was of mounting public concern in 1988. A special Conference Committee on Ethics in Government, established late in 1987, worked throughout 1988 to systematically examine and recommend improvements to the Ethics in Government Act of 1978 and related conflict-of-interest laws.

In its first act, the special committee sponsored a Working Conference on Ethics in Government on March 1, 1988, at which 40 current and former high level government officials and government ethics experts discussed areas for future Conference study. Participants in the conference included former counsels to Presidents Ford, Carter, and Reagan; Sen. Strom Thurmond (R-S.C.); Representatives Barney Frank (D-Mass.) and Benjamin A. Gilman (R-N.Y.); E. Pendleton James and Robert H. Tuttle, personnel directors for President Reagan; Anne McBride, Senior Vice President of Common Cause; Carl Brauer, director of Harvard University's Public/Private Careers Project; and Frank Q. Nebeker, Director of the Office of Government Ethics.

Following up on this meeting, the committee focused its attention on topics relevant to the upcoming presidential transition. The first of these topics, conflict-of-interest standards for transition team members, also was of concern to Congress during its consideration of amendments to the Presidential Transition Act. Although federal ethics laws normally do not apply to transition team workers who are private citizens, during the 70-day transition period many such workers are given access to sensitive information they could potentially use to their advantage upon returning to private industry.

Therefore, the committee proposed a recommendation that President Reagan issue an executive order requiring members of the presidential transition team to agree to abide by a code of ethical conduct as a condition of their access to federal facilities and nonpublic information. The Conference approved this recommendation at its June plenary session. The Conference's proposed transition workers' code of ethical conduct was the model for Transition Standards of Conduct issued by President-elect Bush and incorporated in President Reagan's memorandum on this subject to heads of departments and agencies.

In June the Conference adopted a second recommendation designed to address disincentives to public service and government officials' required disqualification from participating in official decisions that compromise the effective functioning of the governmental process. Presidential appointees and others in government may be required to divest themselves of property to satisfy conflict-of-interest requirements.

Often such divestiture results in significant financial losses in the form of taxation of the gains realized as a result of the forced divestiture. Sometimes qualified candidates do not accept government positions because of the potential tax liability, and in other cases, individuals who accept high level policymaking positions are required to disqualify themselves from participation in important decisions because of financial holdings that constitute a conflict of interest.

As a remedy, the Conference proposed that Congress amend the tax laws to permit affected individuals to sell their property, placing the proceeds in a neutral investment and deferring the taxation of gains. The proposal does not eliminate taxation; it simply postpones payment until the individual ultimately disposes of the proceeds of a reinvestment vehicle. This recommendation was forwarded to the relevant committees of Congress, but was not acted on in 1988.

The Office of the Chairman also offered the General Services Administration its support on government ethics issues during the presidential transition, consistent with congressional sentiment that more be done in this area. This led in December to distribution of a *Sourcebook on Government Ethics for Presidential Appointees* designed to assist agency ethics officials and the White House in educating new presidential appointees about federal ethics laws. The sourcebook included *A Guide To Federal Ethics Laws For Presidential Appointees*, which summarizes in a question-and-answer format the application of ethics statutes and regulations. The guide was prepared by Dr. Robert North Roberts of James Madison University.

At the end of 1988 the Conference was studying two other aspects of government ethics: the Ethics in Government Act's public financial disclosure requirements for the executive branch and conflict-of-interest rules for federal advisory committees.

## ALTERNATIVE MEANS OF DISPUTE RESOLUTION

Since 1982 the Conference has made alternative dispute resolution (ADR) a major initiative. The Conference explores its uses, studies its possibilities and problems, drafts legislation, conducts seminars and training programs, and otherwise encourages and advises individual agencies interested in improving their methods for handling disputes.

The Conference's pioneering initiatives commenced in 1982 with its recommendation that federal agencies consider negotiation among affected parties when drafting proposed regulations for agency consideration.<sup>1</sup> That same year the Conference recommended that agencies provide informal procedures to supplement or replace traditional adjudication to resolve disputes under federal grant programs.<sup>2</sup> In 1986 the Conference undertook its most comprehensive examination of the subject and recommended that administrative agencies adopt alternative methods for resolving a broad range of disputes.<sup>3</sup> ADR has been the subject of several subsequent Conference recommendations,<sup>4</sup> and in 1988 the Conference expanded its activities directed toward improving agency dispute resolution.

The Conference has taken steps to increase agency awareness and to enhance agencies' ability to use consensual methods to resolve disputes. These efforts include (i) publication of a *Sourcebook on Federal Agency Use of Alternative Means of Dispute Resolution*, a hands-on reference guide that describes the various techniques, gives case studies of federal applications, and discusses the legal parameters for implementing an agency ADR program; and (ii) Conference-sponsored colloquies and roundtables on ADR that bring together government and private lawyers, key decisionmaking officials, and ADR experts to discuss agency applications.

In 1988 the Conference continued its research into specific agency uses for ADR and focused on legislation, training, and other activities to help implement consensual methods of dispute resolution. Several pieces of legislation encouraging federal agencies' use of alternative means of dispute resolution were the subjects of hearings and considerable interest in both houses of Congress during 1988.

Chairman Breger testified on May 25 before the Senate Judiciary Subcommittee on Courts and Administrative Practice in support of the most comprehensive of these bills--S. 2274, the Administrative Dispute Resolution Act of 1988. The bill, introduced in April by Senator Charles E. Grassley (R-Iowa) and co-sponsored by Senator Dennis DeConcini (D-Ariz.), would urge government use of ADR, including arbitration in

some cases, and take numerous steps to enhance agencies' practical ability to employ ADR methods. Conference staff offered considerable assistance in drafting the bill, which would expressly implement numerous recommendations of the Administrative Conference. Also testifying at the same hearings was Council member Walter Gellhorn, who commended the bill's common sense approach to administrative processes.

At hearings held June 16 before the House Judiciary Subcommittee on Administrative Law and Governmental Relations, Chairman Breger testified in support of a similar bill.

The Grassley bill (and the similar bill introduced by Rep. Donald Pease (D-Ohio)) supports using flexible alternatives, which would allow the parties to shape procedures to meet their needs on a case-by-case basis. The legislation would apply to myriad disputes relating to agency administrative programs, and would be based on the principle of consent. Among other things, the bills would add a new chapter to the Administrative Procedure Act, comprehensively addressing issues that arise in agency use of ADR. In addition to amending the Federal Tort Claims Act, the bills would also amend the Contract Disputes Act to authorize forms of ADR and encourage agency contracting officers to make all reasonable efforts to resolve claims through consensus. They would also expand FMCS' authority--currently limited almost exclusively to labor disputes in the private sector--to allow FMCS mediators to aid agencies resolve disputes relating to any federal program. The bills would give the Conference new support and advisory and monitoring roles to help agencies use consensual dispute resolution methods.

The Conference with the support of the Department of Justice has benefited from the services of a Distinguished Visiting Fellow in 1988. Mr. Wallace Warfield was previously Acting Director and Associate Director for Field Coordination at the Community Relations Service for the Department of Justice. He has assisted Conference staff in providing training and mediators to agencies wishing to build ADR into their administrative process program for administrative law judges (ALJs) on settlement techniques.

Working with other federal agencies in 1988, the first roster of mediators and neutral advisors to assist in the resolution of federal disputes was prepared. By fall 1989, a system to expedite identifying ADR neutrals who are qualified to mediate a variety of federal disputes should be in place. Availability of a roster would increase agency awareness of ADR availability and enhance agencies' ability to expeditiously locate and retain mediators and other neutrals across the country. The roster had its origins in a series of Conference studies and recommendations on acquiring and using the services of neutrals, as well as in the Conference's statutory mission to serve as a clearinghouse for interchange of information potentially useful in improving administrative procedure.

The Conference assisted the Nuclear Regulatory Commission (NRC) in carrying out section 19 of the Price-Anderson Amendments Act of 1988, Pub. L. 100-408, which required the Commission to conduct a variant of a negotiated rulemaking to determine whether to enter into indemnity agreements with the Commission's radiopharmaceutical licensees. The Act further required the Commission to follow the guidance found in Administrative Conference Recommendation 82-4, and to choose the convenor from a roster of persons approved by the Conference. On August 24 the Conference supplied a list of potential convenors, with brief statements of qualifications; the NRC selected one, and is now engaged in negotiations.

Another project funded in 1988 was the Conference's *Sourcebook on Negotiated Rulemaking*, which offers guidance to agencies implementing this tool. Incorporating both scholarly research and agency experience, it will include descriptive articles, forms, and documentation from agencies that have conducted reg-neg proceedings, Administrative Conference reports and recommendations; specially prepared papers; and sources of additional information and advice for interested agencies and other potential participants.

The Conference assisted in enhancing the use of ADR in trade disputes under the U.S. - Canada Free Trade Agreement (FTA), and other decisions, so as to promote settlements at all stages. It has continued its assistance to agencies involved with contract disputes and environmental enforcement litigation. These efforts, undertaken with the support of the Armed Services Board of Contract Appeals (ASBCA), Environmental Protection Agency (EPA), and the Department of Commerce, have also led to development of model rules and recommendations. The Conference initiated an orientation program for the ASBCA to familiarize its judges with fundamental issues in ADR and to enhance their skills in facilitating settlement.

In December the Conference adopted Recommendation 88-11, *Encouraging Settlements by Protecting Mediator Confidentiality*. This project was undertaken at the request of EPA. It suggests steps agencies can follow to ensure appropriate confidentiality of information neutrals receive in settlement negotiations involving a statute, rule, or policy administered by a federal agency. Issues of confidentiality have been the subject of considerable discussion and even controversy in connection with state legislation, as well as among members of the American Bar Association and the dispute resolution community. The recommendation represents the Conference's effort to address some of these contentious questions. The recommendation and a model rule are set forth in Appendix E (see page 117).

Another Conference recommendation, *Agency Use of Settlement Judges* (88-5), focuses on agency adjudicatory processes and calls for agencies to use a separate settlement judge to assist the parties to reach agreement. The recommendation is based on the view that, in

many cases, a separate settlement judge can exercise greater settlement-inducing authority than the presiding judge. The settlement judge process, already in use at Federal Energy Review Commission (FERC) and Occupational Safety and Health Review Commission (OSHRC), assists by lending structure to the negotiations, controlling their pace, reducing the adversarial nature of the process, and helping the parties to assess objectively the strengths and weaknesses of the case and to find a reasoned, legally defensible settlement. Recommendation 88-5 suggests procedures for using settlement judges and guidelines that seek to balance potential gains in efficiency against possible abuses that may result from an increasing reliance on settlement.

Following approval of Recommendation 88-5, and in response to comments filed by the Office of the Chairman, the Department of Transportation Board of Contract Appeals amended its rules of practice to provide for using settlement judges. The Conference has also worked to train ASBCA administrative judges in mediation and settlement methods. The ASBCA and Corps of Engineers Board of Contract Appeals are now considering changes to make greater use of ADR. Included among these changes is a notice to counsel, which describes and encourages using settlement judges and related methods.

The Conference's ADR initiatives have received strong financial and research assistance from federal agencies and private organizations and individuals. The TRW Foundation supported the Conference's colloquium. In addition, a major part of the research has been done by *pro bono* consultants interested in improving government decisionmaking.

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1. See 1 C.F.R. 305.82-4: Procedures for Negotiating Proposed Regulations (Recommendation 82-4).

2. See 1 C.F.R. 305.82-2: Resolving Disputes Under Federal Grant Programs (Recommendation 82-2).

3. See 1 C.F.R. 305.86-3: Agencies' Use of Alternative Means of Dispute Resolution (Recommendation 86-3).

4. In addition to those listed in the footnotes above, these include Conference Recommendations 87-11, Alternatives for Resolving Government Contract Disputes, 1 C.F.R. 305.87-11; 87-5, Arbitration in Federal Programs, 1 C.F.R. 305.87-5; 86-8, Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution, 1 C.F.R. 305.86-8; 84-7, Administrative Settlement of Tort and Other Monetary Claims Against the Government, 1 C.F.R. 305.84-7; 88-5, Agency Use of Settlement Judges, 1 C.F.R. 305.88-5.

## PRESIDENTIAL REVIEW OF AGENCY RULEMAKING

Some form of presidential review of agency rulemaking has been in existence since at least 1971. President Reagan's program was based on two executive orders and operated through the Office of Information and Regulatory Affairs in the Office of Management and Budget.

In December the Administrative Conference adopted a recommendation supporting the continuation of presidential review of federal agency rulemaking with certain guidelines for its implementation. The Conference's action followed studies of the subject by Conference consultant, Professor Harold H. Bruff of the University of Texas School of Law, and by the National Academy of Public Administration.

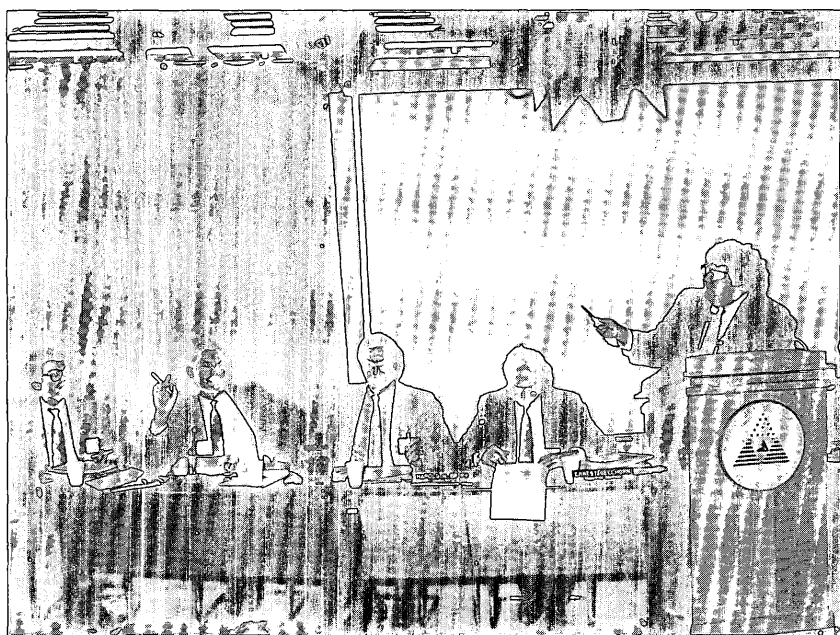
The Conference confined its recommendation to systematic programs of presidential review. This involves coordinating agency actions when conflicts exist and probing the agency's fact and policy judgments, with the purpose of ensuring that the agency considers factors important to the President's policies, to the extent permitted by law. The recommendation does not address ad hoc review by the President or the President's delegates.

While concluding that presidential review should apply generally to federal rulemaking, the Conference recognized that certain types of agency rulemaking are not appropriate for review, including formal rulemaking, ratemaking, and rulemaking that resolves conflicting claims to a valuable privilege. The Conference did not take a position on particular agencies or programs, however, it did agree that presidential review of rulemaking should apply as a matter of principle to independent regulatory agencies to the same extent as it does to the rulemaking of executive departments and agencies.

The guidelines the Conference recommended for any program of presidential review address timeliness of such review, public disclosure of documents, communications between the reviewing officer and agencies, and the procedures for handling comments received by persons outside the government.



Staff attorney David Pritzker looking on as Henry H. Perritt, Jr., consultant and Harris Weinstein, chairman Committee on Governmental Processes discuss federal agency use of computers in acquiring and releasing information.



Chairman Breger raising an issue on presidential review of agency rulemaking to Committee on Rulemaking Chairman Ernest Gellhorn, consultant Harold H. Bruff, member S. Jay Plager, and Mike Bowers staff attorney.

## VALUATION OF HUMAN LIFE IN REGULATION

When federal agencies such as the Occupational Safety and Health Administration (OSHA), EPA, and other health and safety regulatory agencies promulgate standards or make other types of regulatory decisions, they ordinarily estimate the reduction in fatalities likely to follow implementation of the requirements. This estimate is a regular feature of agency regulatory analyses (required by Presidential Executive Order for major regulations) and similar types of cost-benefit analyses.

The Conference discovered that in the course of making such estimates, federal agencies were using a broad range of dollar values per life saved. These ranged from one agency regulation that implicitly valued each life saved at \$70,000 to another that resulted in a figure of \$132 million per life saved. The Chairman commissioned a report to examine methodologies agencies use to value the life-saving benefits of regulation.

Because of the complexity of this issue, the rudimentary state of knowledge in this area and the likelihood that agencies will approach the question somewhat differently, Recommendation 88-7 is somewhat tentative. It urges that when an agency adopts or declines to adopt a regulation intended to reduce the risk to human life, the agency should disclose the dollar value per statistical life used in making its determination--as well as for possible alternative regulations. The Conference also recognizes, however, that in some cases the agencies will decide that such information is too conjectural or that the benefits are nonquantifiable. In those situations the agency should explain the nature and degree of imprecision in the valuation process.

The recommendation also urges agencies to explain their methodology including use of any discount rates that have been factored into the analysis. In addition, the Office of Management and Budget is urged to more actively guide agencies and to serve as a central clearinghouse for research and information on life valuation issues.

## PRELIMINARY CHALLENGES TO AGENCY ACTION

Various federal statutes identify the proper forum--either district court or court of appeals--for judicial review of final agency action. Less clear has been what level of court should have jurisdiction over preliminary challenges to agency action (or inaction) that a court deems reviewable (e.g., claims of unlawful delay by an agency and other challenges that may arise before an agency has taken final action on a matter). In an influential decision on the issue, *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), the United States Court of Appeals for the District of Columbia Circuit concluded that when final agency action is reviewable exclusively in the court of appeals, preliminary challenges will also be subject to exclusive appellate review (so long as disposition of the preliminary challenge might affect the court's ultimate jurisdiction). But questions remained about the applicability of this rule in some situations and about the availability of expeditious, relatively informal review of delay claims in the courts of appeals.

Thomas Sargentich, Professor of Law at American University, prepared a study of this issue for the Conference, which responded by adopting Recommendation 88-6. The recommendation urges that these challenges (when otherwise reviewable) generally be heard by the same level of court that would review the final agency action in the proceeding. The recommendation also asks Congress to deal directly with the issue of preliminary challenges when considering jurisdictional legislation and calls for courts of appeals to ensure that their procedures permit prompt consideration of cases alleging agency delay.

Efforts to implement Recommendation 88-6 have already met with some success. After discussion with Conference representatives on handling delay claims, the Court of Appeals for the District of Columbia Circuit adopted a new rule designed to permit simpler, quicker processing of these cases.

## **CONTRACTOR INDEMNIFICATION**

The Conference looked at the procedures by which agencies decide whether to indemnify government contractors against liability claims by third parties. Such claims may arise when a third party is injured or damaged by a contractor-supplied product or service. A number of agencies have statutory authority to include indemnification provisions in their contracts. While contractors frequently request indemnification clauses, relatively few actually obtain them with little evidence of any resulting claims or litigation.

In 1988 the Conference was able to successfully identify factors agencies should consider when determining whether to indemnify a contractor against claims. Recommendation 88-2 suggests interagency cooperation when an agency has insufficient technical expertise to assess the degree of risk in deciding whether to indemnify. It also calls for compiling information on existing indemnity clauses and any claims under them.

## **FOIA ACCESS TO COMPUTER DATA**

Evolving information technology affects agencies' programs. At the December plenary session, the Conference adopted Recommendation 88-10 offering guidance to agencies that are considering whether to use computers to acquire or release information. The recommendation suggests an analytical framework for assessing options when acquisition or release of information in electronic form may facilitate performance of the agency's mission. Relevant factors identified include costs and benefits as well as the appropriate roles of the public and private sectors. The recommendation states general principles to assist agencies in fulfilling their obligations under the Freedom of Information Act when information is maintained in electronic form. The Conference also urged agencies to experiment with electronic means of providing public participation in administrative proceedings.

## RESEARCH ACTIVITIES

The Conference conducts most of its research by using the services of outside academic or professional consultants, typically law professors with a strong interest in administrative law issues. After a consultant completes a commissioned study, the appropriate Conference committee reviews the report and often develops a proposed recommendation on the subject to be considered by the Assembly of the Conference.

At the end of 1988, approximately 30 research projects were under way. The principal areas of research in 1988 were bank regulatory procedures, government ethics laws, immigration procedures, and the federal health care system. Following is a list of some of these projects:

**ADMINISTRATIVE PROBLEMS OF BANK FAILURES:** Professors Jonathan R. Macey (Cornell University) and Geoffrey P. Miller (University of Chicago) have undertaken a study of procedural and regulatory problems raised by failing or almost-failing banks. Their report will be considered by the Special Committee on Financial Services.

**AGENCY "NONACQUIESCENCE" IN DECISIONS OF REVIEWING COURTS:** When agency action is struck down by a reviewing court, should an agency be barred from continuing that policy and/or relitigating the issue in other courts? Professors Samuel Estreicher and Richard Revesz (New York University) are studying this subject and submitted a report in fall 1988. The Committee on Judicial Review will continue to consider this issue in 1989.

**AGENCY PRACTICES IN INDEXING AND MAKING AVAILABLE THEIR ADJUDICATORY DECISIONS:** This study will examine selected agencies' practices in indexing and making their adjudicatory decisions available to the public. The study will also consider the definition of appropriate practices in light of the Freedom of Information Act's requirements and the practical burdens of making adjudication more precedential. Professor Margaret Gilhooly (Seton Hall University) will conduct the study; a report is expected in 1989.

**APPLICATION OF CONFLICT-OF-INTEREST LAWS TO FEDERAL ADVISORY COMMITTEE MEMBERS:** The application of federal conflict-of-interest laws to advisory committee members depends on whether they are classified as special government employees or representatives of organizations (or sometimes as independent contractors). Richard K. Berg, Esq., will

examine the operation of these distinctions and attempt to bring clarity to this issue. His final report is to be submitted in early 1989.

**ASYLUM PROCEDURES:** A study of the procedures used to decide immigrant asylum claims, including hearing procedures, administrative appeals and judicial review, has been undertaken by Professor David A. Martin of the University of Virginia. A report is expected in spring 1989.

**AUDIT AND INSPECTION PRACTICES OF THE BANKING AGENCIES:** The various banking agencies have developed procedures for examining banking practices and seeking modifications through an array of informal enforcement techniques. This study was begun by Professor Dennis S. Aronowitz of Boston University, but other commitments forced him to discontinue the work in 1988; a new researcher will manage the project in 1989.

**CONGRESSIONAL ACCESS TO CONFIDENTIAL AGENCY INFORMATION:** This study will examine the history of recent disputes over congressional access to internal agency memoranda and commissioners' notes and consider whether there are better ways of resolving them. Professor Peter M. Shane (University of Iowa) will conduct this study and submit a report in 1990.

**ESTABLISHMENT OF REVOLVING FUNDS FOR REMEDIAL AND COMPENSATORY PURPOSES:** The federal government has increasingly resorted to revolving funds to clean up environmental pollution, repair highways and airports, compensate fishermen, and other activities. How these funds are established and operate is the subject of this study to be conducted by Professor Frederick R. Anderson of American University.

**FEDERAL BANK REGULATORY ENFORCEMENT--PRESENT AND FUTURE:** In anticipation of the passage of some form of banking reform legislation, this study will focus on the shortcomings of current procedure and on the proposed legislative response. Professor Lawrence G. Baxter (Duke University) will submit a report on this subject in 1989.

**FEDERAL EMPLOYEE GRIEVANCE AND PERSONNEL APPEALS PROCESSES:** The Conference will study the complex and often redundant system for deciding and reviewing federal personnel actions. The study was undertaken at the behest of the Domestic Policy Council and the Office of Personnel Management. Professor William V. Luneburg of the University of Pittsburgh will submit a report in 1989.

**FEDERAL REGULATION OF BIOTECHNOLOGY:** This study, to be conducted by Professor Sidney A. Shapiro (University of Kansas) will examine the need for coordination in this area and for the development of special regulatory procedures. A report is due in late 1989.

**GUIDE FOR DRAFTING FEDERAL GRANT LEGISLATION:** Federal grant statutes tend to be drafted in a highly inconsistent manner leading to difficult implementation problems. The Conference retained Malcolm Mason, former Chairman of the Department of Health and Human Services Grant Appeals Board, to prepare a guide for legislative drafting in this area. A draft guide was submitted in 1988.

**JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS:** What degree of deference have courts paid to agency interpretation of statutes after the Supreme Court's 1984 decision in *Chevron, U.S.A. v. Natural Resources Defense Council*? Should the degree of deference depend on the level of formality of the agency interpretation? This subject is discussed in a report by Professor Robert A. Anthony of George Mason University. The report will be considered by the Committee on Judicial Review in early 1989.

**JUDICIAL REMANDS OF CASES TO ADMINISTRATIVE AGENCIES:** What happens to appeals from agency decisions that are remanded to the agency? Are the cases settled? Do they return to the courts in a different posture? How do the agencies and courts react? Professors E. Donald Elliott and Peter H. Schuck of Yale Law School will conduct a study of this subject for the Conference.

**LEGALIZATION OF ALIENS:** With the expiration of phase one of the alien legalization program, phase two--applications for permanent residency--has begun. David S. North will be evaluating the process, including use of regional processing centers for adjudication, from the standpoints of fairness and efficiency. A report will be submitted in 1989.

**MODEL RULES OF PRACTICE FOR AGENCY ADJUDICATION:** At present, adjudicatory hearings are held before presiding officers, including administrative law judges, at scores of federal agencies and departments. Each agency has its own set of practice and procedure rules. The Model Rules Working Group will examine whether the development of a set of model rules for use in agency adjudication is practical and, if so, it will draft such rules. As reporter for the working group, Professor Michael P. Cox, Dean of the Thomas Cooley Law School, will examine existing rules of practice and help develop text and commentary for model rules.

**REVIEWABILITY OF CONSULAR OFFICERS' DENIALS OF VISA APPLICATIONS:** This study examines the process of issuing and denying visas in consular offices and explores whether there is a need for either further administrative review or judicial review and what specific changes in the current system should be considered. Professor James A.R. Nafziger of Willamette University will submit a report on this subject early in 1989.

**REVISION OF EXECUTIVE BRANCH FINANCIAL DISCLOSURE REQUIREMENTS:** The Ethics in Government Act of 1978 required public financial disclosure by high level government officials. The Conference has retained Professor Thomas D. Morgan (Emory University) to evaluate the detailed reporting requirements applicable to executive branch officers and employees and to determine whether changes are desirable. The Special Committee on Ethics in Government will meet in early 1989 to consider recommendations stemming from Professor Morgan's report.

**RISK COMMUNICATION AS A REGULATORY APPROACH:** Professor Michael Baram of Boston University will study the operation of various "right-to-know" statutes and regulations administered by the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Food and Drug Administration. He will submit a report on this subject in 1989.

**ROLE OF PEER REVIEW ORGANIZATIONS IN THE MEDICARE PROGRAM:** This study will analyze procedures of the Medicare program's peer review organizations (PROs) and of the Department of Health and Human Services in various aspects of the PRO's activities, including quality of care denials, sanctions, and beneficiary complaints. The Conference's consultant, Professor Timothy S. Jost (Ohio State University) submitted a report in 1988 that formed the basis for a proposed recommendation by the Committee on Adjudication. The proposals were considered at the December 1988 plenary session, but action was deferred until June 1989.

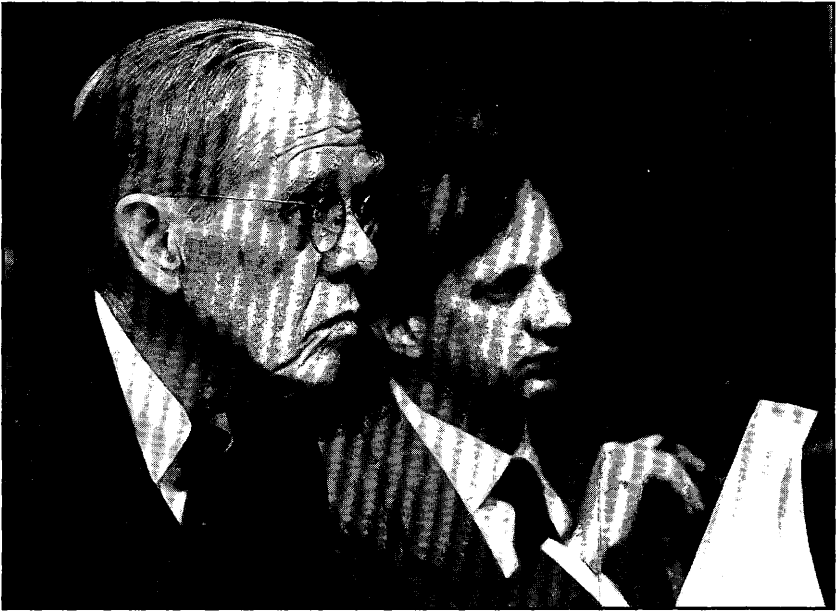
**THE MEDICAID PROGRAM: ASPECTS OF PROCEDURE AND FEDERALISM:** Professor Eleanor D. Kinney (Indiana University) will undertake a broad-scale procedural overview and analysis of the federalism aspects of the Medicaid program. A report is expected in early 1990.

**USE OF ALTERNATIVE DISPUTE RESOLUTION BY AGENCY CONTRACTING OFFICERS:** This study by Richard J. Bednar, Esq., explores ways to increase the involvement of agency contracting officers in use of ADR techniques. The study builds on an earlier one that focused primarily on uses of ADR at the appeals level. A report is due early in 1989.

**USE OF MEDICALLY-TRAINED DECIDERS IN DISABILITY CASES:** Professor Frank S. Bloch (Vanderbilt University) will examine how doctors and other medically-trained persons are or could be used in deciding social security, VA, black lung, and other disability cases. A report will be submitted in early 1989.



*Administration Committee members Sallyanne Payton, Conference Senior Fellow and Professor of Law at the University of Michigan School of Law and George A. Bermann, Professor of Law at Columbia University School of Law at plenary session.*



*Conference Senior Fellow Clark Byse and Ronald A. Cass, commissioner at the Federal Trade Commission, listening to plenary discussion.*



*Members Lewis A. Engman and Marian Blank Horn reviewing floor changes to the Computer Data recommendation on a laptop computer while consultant Henry H. Perritt, Jr. looks on.*

## IMPLEMENTATION, EDUCATION, AND ADVICE

In addition to its role as a *think tank* for administrative law issues, the Conference serves as a resource on administrative law to the Congress, federal agencies, and the public. Conference staff assist Senators and Representatives in drafting legislation pertaining to issues covered by its recommendations, as well as other administrative law topics. They are also available to provide guidance to federal agencies regarding implementation of administrative procedures.

Staff expertise is not the only resource the Conference provides, however. The Conference serves as a clearinghouse for information on administrative law, past and present.

Its library, containing legal periodicals and reference guides, is open to federal personnel and private citizens alike. Furthermore, the Conference produces its own series of publications on current topics of interest, including SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION and AGENCY ARBITRATION, CONSTITUTIONAL AND STATUTORY ISSUES.

Another manifestation of the Conference's commitment to education is its sponsorship of a series of colloquys on emerging issues in administrative law and the regulatory process. Each colloquy provides discussion and debate on the topic at hand via exchange among panelists who are experts in their respective fields. Audience questions provide an additional opportunity for exploring diverse points of view.

The following articles discuss in greater detail the Conference's unique role as an advisor and educator in the field of administrative law.

## LEGISLATIVE ASSISTANCE

The Conference expanded its efforts in 1988 to provide Congress with advice and assistance on legislative matters. As a result of the activities, several pieces of legislation bear the Conference's mark.

Twice during 1988 Congress included in legislation a requirement that an agency use regulatory negotiation according to guidelines the Conference established in Recommendation 82-4, Procedures for Negotiating Proposed Regulations. In the Hawkins-Stafford Elementary

and Secondary School Improvement Amendments (Pub. L. 100-297), Congress directed the Secretary of Education to use a modified negotiated rulemaking technique for drafting rules in connection with the federal aid program for education of disadvantaged children. In the Price-Anderson Nuclear Liability Amendments (Pub. L. 100-408), Congress instructed the Nuclear Regulatory Commission (NRC) to use a form of negotiated rulemaking to decide whether radiopharmaceutical entities should be indemnified. The latter statute also directed the Conference--within 30 days of enactment--to provide the NRC with a list of impartial convenors to conduct the negotiation. The Conference provided a list of about 30 such individuals.

Chairman Breger testified in support of legislation encouraging increased use of negotiated rulemaking. On May 13 he presented the Conference's views on S. 1504, Senator Levin's Negotiated Rule Making Act of 1987. His testimony was delivered at hearings before the Senate Committee on Governmental Affairs. Chairman Breger also testified before the House Judiciary Subcommittee on Administrative Law and Governmental Relations on a similar bill, H.R. 3052, sponsored by Representative Pease.

The bills, which incorporated the basic provisions of Conference Recommendations 82-4 and 85-5, set up a framework for agencies to establish rulemaking negotiating committees and provide for various kinds of assistance by the Conference. Senator Levin's bill passed the Senate without objection in September, but was not acted upon by the House.

Congress enacted legislation (Pub. L. 100-687) affecting procedures at the old Veterans' Administration and the new Department of Veterans' Affairs. The law requires using notice-and-comment rulemaking procedures for all regulations governing loans, grants, or benefits, thus implementing, in part, the Conference's long-standing recommendation (Recommendation 69-8) that Congress eliminate the exemption from notice-and-comment rulemaking for so-called proprietary programs. The Conference submitted testimony on this issue to both the House and Senate Veterans' Affairs committees.

The House passed H.R. 5073, a bill to protect whistleblowers in the aviation industry. The procedural provisions of the bill were modeled on Conference Recommendation 87-2 and reflect the Conference's testimony before the Aviation Subcommittee of the House Committee on Public Works and Transportation and informal discussions between Conference and committee staff.

The House Government Operations Committee report entitled "Combating Fraud, Abuse and Misconduct in the Nation's Financial Institutions: Current Federal Efforts are Inadequate" (House Report 100-1088), substantially incorporated Conference Recommendation 87-12 urging greater consistency and uniformity in the practices of the bank regulatory agencies, greater accessibility to agency decisions, and more efficient use of administrative law judges.

Eight committees or subcommittees asked the Conference to present testimony on twelve occasions in 1988. Among other things, the Conference offered views on legislation for the uniform handling and resolution of all private sector whistleblower complaints (S. 2095), alternative means of dispute resolution (S. 2274), the reauthorization of the Office of Government Ethics and related post-employment restriction matters, and the Regulatory Flexibility Act and the effect of federal regulation on small state and local governmental units.

In addition to providing direct advice to Congress, the Conference held its annual seminar designed to acquaint Congressional staff with the intricacies of administrative law. It also sponsored a colloquy discussing legislative developments in administrative law at which Senator Charles Grassley and Congressman Dan Glickman were the principal speakers.

## **ADVICE AND ASSISTANCE TO AGENCIES**

During 1988 the Conference was quite active in providing advice and assistance to federal agencies in establishing and implementing ADR procedures. In the area of government contract disputes, Conference staff advised the Armed Services Board of Contract Appeals on ADR procedures that can be implemented to bring about more expeditious settlement of disputes that come before them.

Federal equal employment opportunity and workplace disputes have not escaped the Conference's attention. Conference staff provided guidance to staff of the Government Accounting Office (GAO) on using ADR to reduce protracted administrative procedures in resolving various forms of federal agency employee disputes.

Federal agencies interested in using ADR will need to know something about who provides the services when private, third party neutrals are needed. To this end, the Conference, with support from the Environmental Protection Agency (EPA), is developing a roster of neutrals who can be available to assist federal agencies resolve disputes.

A prototype of an ADR roster has already been developed. At the specific direction of Congress, Conference staff helped the Nuclear Regulatory Commission (NRC) in implementing section 19 of the Price-Anderson Amendments of 1988, Pub. L. 100-408, by developing a list of potential convenors for a negotiated rulemaking involving radiopharmaceutical licensees. The NRC selected a convenor from the list and negotiations are in progress.

Conference staff prepared a model notice of proposed rulemaking for agencies to use in promulgating rules on confidentiality of mediator communications in settlement negotiations; the EPA's Office of Enforcement and Compliance Monitoring plans to use the model rule as its proposed rule.

Responding to interest on the part of the Government Executive Institute (GEI), Conference staff held several planning sessions with GEI representatives interested in developing an ADR training program for mid-level and senior government executives.

Conference staff conferred telephonically and provided background material on ADR to representatives of the United States Postal Service concerned about mounting contract disputes.



*Plenary in session at the Federal Home Loan Bank Board.*

## CLEARINGHOUSE ACTIVITY

By statute the Conference is directed to "arrange for interchange among administrative agencies of information potentially useful in improving procedure" (5 U.S.C. 574(2)). Each year the Conference serves as a clearinghouse for information on administrative practice and procedure so that agencies can receive the benefit of each other's and the Conference's experience.

### **Independent Agency Programs**

In 1988 the Conference inaugurated an annual seminar for members of independent federal agencies. More than 50 commissioners representing over two dozen agencies participated. The program featured a talk on comparative governance in Britain and the United States by Sir Alan Walters, Professor of Economics at Johns Hopkins University and former personal economics advisor to Prime Minister Margaret Thatcher. Several other topics were discussed: issues arising under the Sunshine Act and the *ex parte* provisions of the Administrative Procedure Act, constitutional aspects of executive and congressional control of independent agencies, the role of competition in regulation, and risk regulation and risk perception.

The Council of Independent Regulatory Agencies (CIRA) was created in 1982 to facilitate the exchange of information and ideas among the chairmen of 15 major independent regulatory agencies. In 1988 it continued its series of informal breakfast meetings under the *ex officio* leadership of Conference Chairman Breger. Among the speakers at these breakfast meetings were Attorney General Edwin Meese and James C. Miller III, Director of the Office of Management and Budget.

### **Equal Access to Justice Act**

The Equal Access to Justice Act (EAJA) provides for awarding attorneys' fees and expenses to parties who prevail against the federal government in certain administrative or court proceedings. The Act assigned important consulting and reporting responsibilities to the Chairman of the Conference, including the collection of and reporting on data about EAJA cases at administrative agencies. In 1988 the Conference completed work on its 1986 report and began collecting the necessary data for the 1987 report.

## PUBLICATIONS

The Conference issues several types of publications including reports, sourcebooks, and a newsletter. A regular feature of the newsletter is a list of recent developments in federal agency negotiated rulemaking proceedings. It noted that, in the first case involving a regulation promulgated through negotiated rulemaking, the Court of Appeals for the District of Columbia Circuit upheld the EPA's final rule on inspection and abatement of asbestos-containing materials in school buildings. The negotiated rulemaking procedure itself was not challenged (*Safe Buildings Alliance v. EPA*, 846 F.2d 79 (D.C.Cir.1988))

The Conference's publications reflect the variety of its research interests. In 1988, the Conference published *AGENCY ARBITRATION* the first in a new series titled *Studies in Administrative Law and Practice*. This book includes reports by Richard K. Berg and Harold H. Bruff, Recommendations 86-3 and 87-5, congressional testimony by Chairman Breger, a Conference brochure, and the text of S. 2274 (the Administrative Dispute Resolution Act of 1988). GPO selected *AGENCY ARBITRATION* to be sold through the Superintendent of Documents.

As its title suggests, *FEDERAL USER FEES, PROCEEDINGS OF A SYMPOSIUM* consists of Thomas D. Hopkins' edited transcript of a symposium held May, 3, 1988 at the National Press Club in Washington. (See page 127 for more detail.) The *SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION* (1987) and the first reference guide, *FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK: STATUTES AND RELATED MATERIALS* (1985), remain in demand.

Other publication types include: how-to guides, such as the *MANUAL FOR ADMINISTRATIVE LAW JUDGES* and *A GUIDE TO FEDERAL AGENCY RULEMAKING*; and special studies of administrative law issues, such as *EXPEDITING SETTLEMENT OF EMPLOYEE GRIEVANCES IN THE FEDERAL SECTOR*. *THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES RECOMMENDATIONS AND REPORTS*, published each year, contains copies of the recommendations and their accompanying reports. A bibliography of the 1988 Conference's publications, reports, and articles is on page 127, Appendix F of this annual report.

All Conference publications are available through the Federal Depository Library Program. The Government Printing Office sells some of the books; Appendix F contains all necessary information for purchasing copies. Archival and interlibrary loan copies are retained in the Conference's library at 2120 L Street NW. in Washington, DC. A limited number of copies of recent publications may be available from the Conference on request.



*Douglas Kmiec, former assistant attorney general, Office of Legal Counsel, presenting remarks at colloquy on separation of powers.*

## COLLOQUIA

In accordance with its mandate, the Administrative Conference promotes discussion and debate on emerging issues in administrative law and the regulatory process. As part of this effort, during 1988 the Conference sponsored a series of discussion programs.

In addition, a full-day symposium on procedural issues in setting user fees, funded in large part by federal agencies charged with the administration of user fee programs, sponsored by the Conference was attended by over 100 federal agency officials. OMB Director and Council Vice Chairman James C. Miller III was one of the speakers.

The Special Committee on Ethics chaired by Fred F. Fielding brought together 40 current and former high level government officials and government ethics experts, including former counsels to Presidents Ford, Carter, and Reagan, and several members of Congress, for a discussion of ethics issues.

As a co-sponsor with the General Services Administration the Conference conducted a seminar on managing federal advisory committees. Among the issues discussed were the application of federal conflict-of-interest laws to advisory committee members and legislative initiatives likely to improve implementation of the Act.

### **Airline Deregulation**

At the first colloquy of the year Secretary of Transportation and ACUS Council member James H. Burnley, IV defended airline deregulation as "one of the great populist reforms since World War II." In remarks, Secretary Burnley called attention to a doubling of traffic since the Airline Deregulation Act of 1978, a dramatic decline in fares in real terms, 30-percent growth in industry employment, and an almost 30-percent reduction in fatality rates. Professor Michael Levine of the Yale School of Organization and Management basically confirmed these observations, but joined the panel's third member, Cornish Hitchcock, in criticizing the Department of Transportation's (DOT) willingness to approve industry mergers. Mr. Hitchcock, Legal Director of the Aviation Consumer Action Project, noted that in deregulating entry and pricing, Congress did not intend to decrease government surveillance of safety, consumer protection, or antitrust enforcement. He endorsed DOT's new initiative to issue monthly reports on airline performance but urged scrutiny of data submitted by carriers.

### **Administrative Law and Congress**

In April the Conference organized a colloquy to examine administrative law issues facing the 100th Congress. Joining Chairman Breger on the panel were Senator Charles Grassley, Representative Dan Glickman, and Senior Conference Fellow William H. Allen, a specialist in constitutional and administrative law. Senator Grassley stressed the need for legislation to encourage federal agency use of alternative means of dispute resolution. He also argued against creating an independent corps of administrative law judges (ALJs), suggesting that ALJs need agency-specific expertise and cannot simply be generalists or "fungible commodities." Finally, Senator Grassley urged that government contractors not be allowed to bill the government for legal expenses incurred when the government brings suit against them. Representative Glickman supported the proposal to create an ALJ corps as an appropriate way of ensuring the independence of administrative law judges, and expressed concern regarding the system of adjudication and appeal included in fair housing legislation then before Congress. Mr. Allen described the process by which one major administrative reform, legislation to end races to the courthouse, was recently adopted.

### **Federal User Fees**

Federal user fees was the topic of a day-long symposium sponsored by the Conference on May 3. Coordinated by Dr. Thomas Hopkins of American University, coauthor of a Conference study on federal user fees, the program examined the subject through the eyes of several prominent economists, policy analysts, lawyers, and financial managers. James C. Miller III, Director of the Office of Management and Budget and ACUS Vice Chairman, endorsed user fees as part of a "larger

effort to make government leaner, more efficient, and more productive.” Dr. Thomas Gale Moore, a member of the President’s Council of Economic Advisors, discussed user fees and privatization. Emory University Professor Milton Kafoglis focused on the use of user fees as a regulatory tool; ACUS member James Richards, Inspector General of the Interior Department, explained the findings of several pertinent government audits; and Dr. David Lewis of Ottawa offered insights into the Canadian government’s use of fees. Other panelists included Janet Hale of the Department of Transportation; Dr. Everett Ehrlich of the Congressional Budget Office; various academics in the field; and officials of the Environmental Protection Agency, the Federal Energy Regulatory Commission, and the Nuclear Regulatory Commission.

### **Administrative Process Issues**

A statement from President Reagan opened a 1-day seminar on “Current Issues in the Administrative Process” organized in May for commissioners of independent agencies. He described these agencies as “special institutions which bring together individuals of diverse views, expertise, and backgrounds to tackle some of the most legally difficult and technically complex regulatory issues of our day.” The program, held in cooperation with the organization Executive Level IV, featured a range of topics and speakers, including ACUS member Peter L. Strauss of Columbia Law School, James Curtiss of the Senate Environment and Public Works Subcommittee on Nuclear Regulation, Professor Michael Levine of the Yale School of Organization and Management, Dr. Vincent T. Covello of Columbia University’s Center for Risk Communication, and Gary Davis of the Office of Government Ethics. Sir Alan Walters, a principal architect of Prime Minister Thatcher’s economic program, discussed how government structure affects the manner by which reforms are instituted. ACUS General Counsel Gary Edles addressed recent developments in key areas of administrative law, and Conference Research Director Jeffrey Lubbers discussed pending research issues.

### **Federal Advisory Committees**

The Conference, together with the General Services Administration, co-sponsored the First Annual Conference on Federal Advisory Committee Management May 12-13. Participants addressed several issues as they relate to federal advisory committees, including the value of using citizen expertise from outside the government, management initiatives, the application of conflict-of-interest rules, and legislative initiatives to amend the Federal Advisory Committee Act. Speakers included ACUS member and former Counsel to the President Lloyd N. Cutler; Chairman Breger; L. Bruce Laingen, Executive Director of the

National Commission on the Public Service; L. James Dean, Director of GSA's Committee Management Secretariat; Ray Kline, President of the National Academy of Public Administration; Eric Glitzenstein of the Public Citizen Litigation Group; Roberta Fede, President of the Federal Advisory Committee Management Association; Robert Halstead of the President's Council on Management Improvement; and a number of other private and government experts on the topic.

### **Constitutional Checks and Balances**

On September 28, the Conference sponsored a colloquy on the case of *Morrison v. Olson*, in which the Supreme Court affirmed the constitutionality of the independent counsel statute. Chairman Breger hosted a lively panel of experts who delved into the separation-of-powers issues raised by the Court's decision to uphold the appointment of "special prosecutors" independent of the Justice Department to investigate and prosecute serious crimes committed by high executive branch officials. Professor Harold Bruff of the University of Texas suggested that the decision did not infringe on presidential power, as it created only a limited exception to the rule that federal prosecutors are appointed and removed by the President. Douglas Kmiec, Assistant Attorney General for the Office of Legal Counsel, argued that an accumulation of similar encroachments on presidential authority "may very well weaken the presidency in ways that are unacceptable to our constitutional structure." In contrast, Michael Davidson, Legal Counsel to the U.S. Senate, maintained that *Morrison* was an important affirmation of constitutional checks and balances.

### **Ethics**

Immediately following President Reagan's veto of the Post-Employment Restrictions Act of 1988, the Conference provided a forum to assess the matter with a colloquy entitled "Ethics in Government: Where Do We Go From Here?" While discussing a broad range of ethics issues such as financial reporting requirements, tax deferrals, and ethics education, the panelists focused most of their attention on post-employment restrictions. Representative Barney Frank, sponsor of the vetoed bill, maintained that the veto would effectively curtail ethics legislation in the near future. Chairman Breger suggested that the veto afforded an opportunity to look anew at the potential impact of post-employment restrictions and fine tune the reforms under consideration. C. Boyden Gray, Counselor to President Bush, noted that ethics was one of the President-elect's chief concerns and pledged that Mr. Bush would propose new ethics legislation shortly after assuming office.

# APPENDICES

- A. Members of the Administrative Conference
- B. Biographical Information
- C. Staff of the Chairman
- D. Organization and Operation
- E. Recommendations and Statement
- F. Conference Publications
- G. Bylaws of the Administrative Conference
- H. The Administrative Conference Act



*Chief judges Edward D. Re, U.S. Court of International Trade, Howard T. Markey, U.S. Court of Appeals for Federal Circuit, and Loren A. Smith, U.S. Claims Court and former Conference Chairman at plenary session.*



*Diane S. Killory, General Counsel, Federal Communications Commission addressing members at the plenary session while members Sally Katzen and Neil Eisner look on.*

# APPENDIX A - MEMBERS OF THE ADMINISTRATIVE CONFERENCE

## THE COUNCIL

*Chairman*                      MARSHALL J. BREGER

*Vice Chairman*                JAMES C. MILLER III<sup>1</sup>

*Members*

CURTIS H. BARNETTE  
 PHILLIP D. BRADY  
 JAMES H. BURNLEY IV<sup>1</sup>  
 ARNOLD I. BURNS<sup>2</sup>  
 WALTER GELLHORN  
 EDITH D. HAKOLA<sup>3</sup>  
 TRUDI M. MORRISON  
 DANIEL OLIVER  
 R. CARTER SANDERS  
 OTIS M. SMITH<sup>4</sup>  
 MARK SULLIVAN III  
 EDWARD L. WEIDENFELD

## GOVERNMENT MEMBERS

<i>Department of Agriculture</i>	JOHN GOLDEN
<i>Department of Commerce</i>	ROBERT H. BRUMLEY II
<i>Commission on Civil Rights</i>	WILLIAM H. GILLERS
<i>Commodity Futures Trading Commission</i>	MARSHALL E. HANBURY
<i>Consumer Product Safety Commission</i>	ANNE GRAHAM
	CAROL G. DAWSON <sup>2</sup>
<i>Department of Defense</i>	PAUL E. WILLIAMS <sup>3</sup>
	ROBERT L. GILLIAT

<i>Department of Education</i>	WENDELL L. WILLKIE II <sup>2</sup>
<i>Department of Energy</i>	ERIC J. FYGI
<i>Environmental Protection Agency</i>	LAWRENCE J. JENSEN
	FRANCIS S. BLAKE <sup>2</sup>
<i>Equal Employment</i>	
<i>Opportunity Commission</i>	R. GAULL SILBERMAN
<i>Federal Communications Commission</i>	DIANE S. KILLORY
<i>Federal Deposit Insurance Commission</i>	ROGER A. HOOD
<i>Federal Election Commission</i>	SCOTT E. THOMAS <sup>2</sup>
	LAWRENCE M. NOBLE
<i>Federal Energy Regulatory Commission</i>	CATHERINE C. COOK
<i>Federal Home Loan Bank Board</i>	EUGENE M. KATZ
	WILLIAM L. VAN LENTEN <sup>2</sup>
<i>Federal Maritime Commission</i>	JOHN ROBERT EWERS
<i>Federal Reserve System</i>	MICHAEL BRADFIELD
<i>Federal Trade Commission</i>	TERRY CALVANI
<i>General Services Administration</i>	ROBERT C. MACKICHAN
	CLYDE C. PEARCE, JR. <sup>2</sup>
<i>Department of Health and Human Services</i>	DARREL J. GRINSTEAD
	DON M. NEWMAN
<i>(Food and Drug Administration)</i>	FRANK E. YOUNG
<i>Department of Housing and</i>	
<i>Urban Development</i>	J. MICHAEL DORSEY
	ALAN W. HEIFETZ <sup>5</sup>
<i>Department of the Interior</i>	DONALD H. PEARLMAN <sup>6</sup>
	JAMES R. RICHARDS <sup>7</sup>
<i>Interstate Commerce Commission</i>	KATHLEEN D. RIBAUDO
	MALCOLM M. B. STERRETT <sup>2</sup>
<i>Department of Justice</i>	KEVIN R. JONES
	WILLIAM BRADFORD
	REYNOLDS <sup>2</sup>
<i>Department of Labor</i>	SETH D. ZINMAN
<i>(Occupational Safety and</i>	
<i>Health Administration)</i>	JOHN A. PENDERGRASS
<i>Merit Systems Protection Board</i>	DANIEL R. LEVINSON
<i>National Aeronautics and</i>	EDWARD A. FRANKLE
<i>Space Administration</i>	JOHN E. O'BRIEN <sup>2</sup>
<i>National Labor Relations Board</i>	WILFORD W. JOHANSEN
<i>Nuclear Regulatory Commission</i>	WILLIAM C. PARLER
<i>Occupational Safety and</i>	EARL R. OHMAN, JR.
<i>Health Review Commission</i>	M. DENNIS DAUGHERTY <sup>2</sup>
<i>Office of Management and Budget</i>	S. JAY PLAGER
<i>Office of Personnel Management</i>	JAMES M. STROCK
	HUGH HEWITT <sup>2</sup>

<i>Securities and Exchange Commission</i>	DANIEL L. GOELZER
	AULANA L. PETERS <sup>2</sup>
<i>Small Business Administration</i>	FRANK S. SWAIN
<i>Department of State</i>	ABRAHAM D. SOFAER
<i>Department of Transportation</i>	NEIL R. EISNER
<i>(Federal Aviation Administration)</i>	GREGORY S. WALDEN
	E. TAZEWEEL ELLETT <sup>2</sup>
<i>Department of the Treasury</i>	JEANNE S. ARCHIBALD
	D. EDWARD WILSON <sup>2</sup>
<i>(Internal Revenue Service)</i>	JAMES J. KEIGHTLEY
<i>U.S. International Trade Commission</i>	RONALD A. CASS
	SUSAN LIEBELER <sup>2</sup>
<i>U.S. Postal Service</i>	STEPHEN EBBERT ALPERN
	LOUIS A. COX <sup>2</sup>
<i>Veterans Administration</i>	FREDERIC L. CONWAY

## PUBLIC MEMBERS

WARREN BELMAR	SALLY KATZEN
GEORGE A. BERMAN	ROBERT M. KAUFMAN
KENNETH J. BIALKIN	CAROLYN B. KUHLE
PHILIP C. BOBBITT	RICHARD J. LEIGHTON
ELLIOT BREDHOFF	BEVIS LONGSTRETH
JAMES H. BURNLEY IV <sup>8</sup>	JAMES C. MILLER III <sup>8</sup>
JOSEPH A. CANNON	JOSEPH A. MORRIS <sup>9</sup>
BETTY JO CHRISTIAN	ALAN B. MORRISON
H. RODGIN COHEN, JR. <sup>2</sup>	SALLYANNE PAYTON <sup>4</sup>
H. CLAYTON COOK, JR. <sup>4</sup>	HARVEY LLOYD PITT <sup>2</sup>
ELDON H. CROWELL	MONROE F. PRICE <sup>2</sup>
LLOYD NORTON CUTLER	R. DAVID PITTLE
MITCHELL E. DANIELS, JR.	BRUCE RABB <sup>9</sup>
LEWIS A. ENGMAN	VICTOR G. ROSENBLUM
DANIEL F. EVANS, JR.	EDWARD C. SCHMULTS <sup>2</sup>
FRANK J. FAHRENKOPF, JR.	PETER L. STRAUSS
WALTER FELDESMAN <sup>2</sup>	THOMAS M. SUSMAN
FRED F. FIELDING	PHILLIP N. TRULUCK
ERNEST GELLHORN	PAUL R. VERKUIL
MICHAEL D. HAWKINS	MICHAEL B. WALLACE
ERNEST B. HUETER <sup>2</sup>	HARRIS WEINSTEIN
PAUL D. KAMENAR	

## LIAISON REPRESENTATIVES

<i>ABA Administrative Law Section</i>	PHILIP A. F. LEMING
	WILLIS B. SNELL <sup>2</sup>
<i>ABA National Conference of Administrative Law Judges</i>	JOHN M. VITTONÉ
<i>ACTION</i>	MARVIN H. MORSE <sup>10</sup>
<i>Administrative Office of the U.S. Courts</i>	TERRY CAMPO <sup>11</sup>
<i>Advisory Commission on Intergovernmental Relations</i>	L. RALPH MECHAM
<i>Council on Environmental Quality</i>	DAVID E. NETHING
<i>Executive Office for Immigration Review</i>	DINAH BEAR
<i>Executive Office of the President</i>	WILLIAM R. ROBIE
<i>Federal Administrative Law Judges Conference</i>	JAY B. STEPHENS <sup>2</sup>
<i>Federal Judicial Center</i>	JAMES P. TIMONY
<i>Federal Labor Relations Authority</i>	JOHN J. MATHIAS <sup>2</sup>
	CHARLES W. NIHAN
	WILLIAM E. PERSINA
	RUTH E. PETERS <sup>2</sup>
<i>Federal Mediation &amp; Conciliation Service</i>	THEODORE M. CHASKELSON
	DANIEL P. DOZIER <sup>2</sup>
<i>Federal Mine Safety and Health Review Commission</i>	FORD B. FORD
<i>General Accounting Office</i>	ROLLEE H. EFROS
<i>Judicial Conference of the U.S.</i>	STEPHEN G. BREYER
	KENNETH W. STARR
<i>Office of the Federal Register</i>	JOHN E. BYRNE <sup>2</sup>
<i>Pension Benefit Guaranty Corporation</i>	ROYAL F. DELLINGER
<i>Postal Rate Commission</i>	JANET D. STEIGER
<i>Selective Service System</i>	HENRY N. WILLIAMS
<i>U. S. Claims Court</i>	MARIAN BLANK HORN
<i>U. S. Court of Appeals, Federal Circuit</i>	HOWARD T. MARKEY
<i>U. S. Court of International Trade</i>	EDWARD D. RE
<i>U. S. Court of Military Appeals</i>	ROBINSON O. EVERETT

## SENIOR FELLOWS

WILLIAM H. ALLEN	MAX D. PAGLIN
ROBERT A. ANTHONY	SALLYANNE PAYTON <sup>12</sup>
CLARK BYSE	REUBEN B. ROBERTSON III
H. CLAYTON COOK, JR.	HAROLD L. RUSSELL
KENNETH CULP DAVIS	ANTONIN SCALIA
MARION EDWYN HARRISON <sup>2</sup>	LOREN A. SMITH
S. NEIL HOSENBALL	OTIS M. SMITH <sup>8</sup>
CORNELIUS B. KENNEDY	JAMES E. WESNER
MALCOLM S. MASON	RICHARD E. WILEY
OWEN OLPIN	JERRE S. WILLIAMS
	FRANK M. WOZENCRAFT

## SPECIAL COUNSELS

C. BOYDEN GRAY	ALICE L. O'DONNELL
EDITH D. HAKOLA <sup>8</sup>	WILLIAM T. QUILLEN
DENNIS J. LEHR	BRUCE RABB <sup>12</sup>
THOMAS J. LYKOS, JR.	RONALD E. ROBERTSON
WILLIAM H. McDAVID	STANLEY SPORKIN
JOSEPH A. MORRIS <sup>12</sup>	JOHN W. WALKER, JR.

- 
1. Became public member during 1988.
  2. Term of service ended during 1988.
  3. Became special counsel in 1988.
  4. Became senior fellow in 1988.
  5. Designated Administrative Law Judge.
  6. Resigned during 1988.
  7. Designated Inspector General.
  8. Also served as Council member during 1988.
  9. Also served as special counsel during 1988.
  10. Became liaison member from the Federal Bar Association during 1988.
  11. Term of service ended in 1988, no longer a liaison agency.
  12. Also served as public member during 1988.
  13. Designated Board of Contract Appeals member.



*Former FBI Director William Webster and Conference Chairman Breger enjoying the plenary reception.*



*Cheryl Matheis of AARP stating concerns about Medicare peer review organizations as Carter G. Phillips, member of the law firm of Sidley Austin, listens.*

## APPENDIX B - BIOGRAPHICAL INFORMATION

### MEMBERS\*

**William H. Allen**, Esquire, member of the law firm of Covington & Burling, Washington, DC. Public Member 1972-82. Senior Fellow since 1982. Committee on Judicial Review.

**Stephen Ebbert Alpern**, Associate General Counsel for Labor Law, U.S. Postal Service, Washington, DC. Appointed Government Member on January 13, 1988. Committee on Administration.

**Robert A. Anthony**, Professor of Law, George Mason University School of Law, Arlington, VA. Chairman of the Administrative Conference of the United States 1974-79. Consultant on: comparative proceedings for broadcast licensing, 1970-71; *Confidential Information in ITC Cases* (Recommendation 84-6); judicial deference to agency interpretations. Senior Fellow since 1982. Committee on Regulation.

**Jeanne S. Archibald**, Deputy General Counsel, Department of the Treasury, Washington, DC. Appointed Government Member on June 13, 1988. Committee on Financial Services; Advisory Committee on Administrative Procedures Under the U.S.-Canada Free Trade Agreement.

**Curtis H. Barnette**, Senior Vice President, General Counsel and Secretary, Bethlehem Steel Corporation, Bethlehem, PA. Appointed Council Member June 6, 1988. Committee on Governmental Processes; Advisory Committee on Administrative Procedures Under the U.S.-Canada Free Trade Agreement.

**Dinah Bear**, General Counsel, Council on Environmental Quality, Washington, DC. Liaison Representative since 1986. Committee on Administration.

**Warren Belmar**, Esquire, member of the law firm of Fulbright & Jaworski, Washington, DC. Public Member since 1986. Committee on Judicial Review; Committee on Financial Services.

**George A. Bermann**, Professor of Law, Columbia University School of Law, New York, NY. Consultant on governmental torts (Recommendation 84-7). Public Member since 1986. Committee on Administration; Advisory Committee on Administrative Procedures Under the U.S.-Canada Free Trade Agreement.

**Kenneth J. Bialkin**, Esquire, member of the law firm of Skadden, Arps, Slate, Meagher & Flom, New York, NY. (formerly at Willkie, Farr & Gallagher, New York, NY.). Public Member since 1986. Committee on Financial Services (Chairman).

**Francis S. Blake**, General Counsel, Environmental Protection Agency, Washington, DC. Government Member 1985-88. Committee on Regulation.

**Philip C. Bobbitt**, Professor of Law, University of Texas Law School, Austin, TX. Public Member since 1987. Committee on Adjudication; Committee on Ethics in Government.

**Michael Bradfield**, General Counsel, Board of Governors of the Federal Reserve System, Washington, DC. Government Member since 1981. Committee on Regulation; Committee on Financial Services.

**Phillip D. Brady**, Deputy Counsel to the President, The White House, Washington, DC. Appointed Council Member June 6, 1988. Committee on Ethics in Government.

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\*During calendar year 1988. Affiliations and positions are listed as of December 31 or the date of termination of Conference service, if earlier.

**Elliot Bredhoff**, Esquire, Senior Partner of the law firm of Bredhoff & Kaiser, Washington, DC. Appointed Public Member September 22, 1988. Committee on Adjudication.

**Marshall J. Breger**, Chairman of the Administrative Conference of the United States since 1985.

**Stephen G. Breyer**, Judge, United States Court of Appeals for the First Circuit, Boston, MA. Liaison Representative (Judicial Conference of the U.S.) since 1981. Committee on Adjudication.

**Robert H. Brumley II**, Acting General Counsel, Department of Commerce, Washington, DC. Government Member since 1987. Committee on Financial Services; Advisory Committee on Administrative Procedures Under the U.S.-Canada Free Trade Agreement.

**James H. Burnley IV**, Esquire, Member of the law firm Shaw, Pittman, Potts & Trowbridge, Washington, DC. Public member since 1988. (Former Secretary, Department of Transportation) Council Member 1987-1988. Committee on Rulemaking.

**Arnold I. Burns**, Deputy Attorney General, Department of Justice, Washington, DC. Council Member 1986-1988. Committee on Administration.

**John E. Byrne**, Director of the Federal Register, National Archives and Records Service, Washington, DC. Liaison Representative 1980-88. Committee on Administration.

**Clark Byse**, Professor Emeritus, Harvard Law School, Cambridge, MA. Public Member 1968-1982; Senior Fellow since 1982. Committee on Administration.

**Terry Calvani**, Commissioner, Federal Trade Commission, Washington, DC. Government Member since 1985. Committee on Rulemaking.

**Terry Campo**, General Counsel and Director of Legislative Affairs, ACTION, Washington, DC. Appointed Liaison Representative on June 1, 1988. Committee on Regulation.

**Joseph A. Cannon**, President, Geneva Steel Corporation, Provo, UT. (Formerly of the law firm of Pillsbury, Madison & Sutro, Washington, DC). Appointed Public Member on September 1, 1988. Committee on Regulation.

**Ronald A. Cass**, Commissioner, U.S. International Trade Commission, Washington, DC. Consultant on: review of ALJ decisions (Recommendation 83-3); Federal Tort Claims Act's discretionary function exception (1986-87). Government Member Appointed on October 14, 1988. Committee on Adjudication.

**Theodore M. Chaskelson**, General Counsel, Federal Mediation and Conciliation Service, Washington, DC. Appointed Liaison Representative on November 7, 1988. Committee on Administration.

**Betty Jo Christian**, member of the law firm of Steptoe & Johnson, Washington, DC. Government Member (ICC) 1977-79; Public Member since 1980. Committee on Regulation (Chairman).

**H. Rodgin Cohen, Jr.**, partner with the law firm of Sullivan & Cromwell, New York, NY. Public Member 1987-88. Committee on Financial Services.

**Frederic L. Conway**, Special Assistant to the General Counsel, Veterans Administration, Washington, DC. Government Member since 1983. Committee on Administration.

**Catherine C. Cook**, General Counsel, Federal Energy Regulatory Commission, Washington, DC. Government Member since 1987. Committee on Regulation.

**H. Clayton Cook, Jr.**, Esquire, member of the law firm of Cadwalader, Wickersham & Taft, Washington, DC. Public Member 1980-88. Appointed Senior Fellow on August 5, 1988. Committee on Judicial Review (Chairman) 1980-86; Committee on Rulemaking; Committee on Administration.

**Louis A. Cox**, General Counsel, United States Postal Service, Washington, DC. Government Member 1972-88. Committee on Administration.

**Eldon H. Crowell**, Esquire, senior partner of the law firm of Crowell & Moring, Washington, DC. Consultant on: use of minitrials in federal contract disputes (1986-87); *Alternatives for Resolving Government Contract Disputes* (Recommendation 87-11). Public Member since 1986. Committee on Administration.

**Lloyd Norton Cutler**, Esquire, senior partner of the law firm of Wilmer, Cutler & Pickering, Washington, DC. Public Member since 1986. Committee on Regulation; Committee on Ethics in Government.

**Mitchell E. Daniels, Jr.**, President and Chief Executive Officer, Hudson Institute, Indianapolis, IN. Public Member since 1987. Committee on Judicial Review.

**M. Dennis Daugherty**, Legal Counsel to the Chairman, Occupational Safety & Health Review Commission, Washington, DC. Government Member 1985-88. Committee on Judicial Review.

**Kenneth Culp Davis**, Professor of Law, University of San Diego School of Law, San Diego, CA. Public Member 1968-82; Senior Fellow since 1982. Committee on Rulemaking.

**Carol G. Dawson**, Vice Chairman, Consumer Product Safety Commission, Washington, DC. Government Member 1985-88. Committee on Governmental Processes.

**Royal F. Dellinger**, Deputy Executive Director, Pension Benefit Guaranty Corporation, Washington, DC. Liaison Representative since 1985. Committee on Administration.

**J. Michael Dorsey**, General Counsel, Department of Housing and Urban Development, Washington, DC. Government Member since 1987. Committee on Governmental Processes; Committee on Administration.

**Daniel P. Dozier**, Legal Counsel, Federal Mediation and Conciliation Service, Washington, DC. Liaison Representative 1986-88. Committee on Administration.

**Rollee H. Efros**, Associate General Counsel, General Accounting Office, Washington, DC. Liaison Representative since 1984. Committee on Administration.

**Neil R. Eisner**, Assistant General Counsel, Department of Transportation, Washington, DC. Government Member since 1982. Committee on Governmental Processes (Vice Chairman); Model Rules Working Group.

**E. Tazewell Ellett**, Chief Counsel, Federal Aviation Administration, Washington, DC. Government Member 1985-88. Committee on Rulemaking.

**Lewis A. Engman**, member of the law firm of Winston & Strawn, Washington, DC. Public Member since 1986. Committee on Governmental Processes.

**Daniel F. Evans, Jr.**, member of the law firm of Baker & Daniels, Indianapolis, IN. Public Member since 1984. Committee on Rulemaking.

**Robinson O. Everett**, Chief Judge, United States Court of Military Appeals, Washington, DC. Liaison Representative since 1984. Committee on Governmental Processes.

**John Robert Ewers**, Director, Bureau of Administration, Federal Maritime Commission, Washington, DC. Government Member since 1985. Committee on Rulemaking.

**Frank J. Fahrenkopf, Jr.**, Chairman, Republican National Committee, Washington, DC. Public Member since 1986. Committee on Governmental Processes.

**Walter Feldesman**, Esquire, member of the law firm of Summit, Rovins & Feldesman, New York, NY. Public Member 1986-88. Committee on Rulemaking.

**Fred F. Fielding**, Esquire, member of the law firm of Wiley, Rein & Fielding, Washington, DC. Special Counsel 1981-86; Public Member since 1986. Committee on Governmental Processes; Committee on Ethics in Government (Chairman).

**Philip A. Fleming**, Esquire, partner of the law firm of Crowell & Moring, Washington, DC. Appointed Liaison Representative (American Bar Association Section on Administrative Law) on September 1, 1988. Committee on Regulation.

**Ford B. Ford**, Chairman, Federal Mine Safety and Health Review Commission, Washington, DC. Liaison Representative since 1986. Committee on Regulation.

**Edward A. Frankle**, General Counsel, National Aeronautics and Space Administration, Washington, DC. Appointed Government member on September 30, 1988. Committee on Administration.

**Eric J. Fygi**, Deputy General Counsel, Department of Energy, Washington, DC. Appointed Government Member on March 24, 1988. Committee on Judicial Review.

**Ernest Gellhorn**, member of the law firm of Jones, Day, Reavis & Pogue, Washington, DC. Consultant on: summary judgment in administrative adjudication (Recommendation 70-3); interlocutory appeal procedures (Recommendation 71-1); public participation in administrative hearings (Recommendation 71-6); adverse agency publicity (Recommendation 73-1); and legislative veto (Recommendation 77-1). Public Member since 1986. Committee on Rulemaking (Chairman).

**Walter Gellhorn**, Professor Emeritus, Columbia University School of Law, New York, NY. Council Member since 1968. Committee on Administration.

**William H. Gillers**, Solicitor, United States Commission on Civil Rights, Washington, DC. Government Member since 1986. Committee on Administration.

**Robert L. Gilliat**, Assistant General Counsel, Department of Defense, Washington, DC. Government Member since 1977. Committee on Adjudication.

**Daniel L. Goelzer**, General Counsel, Securities & Exchange Commission, Washington, DC. Appointed Government Member on July 25, 1988. Committee on Adjudication.

**John Golden**, Associate General Counsel, Department of Agriculture, Washington, D.C. Government Member since 1983. Committee on Regulation (Vice Chairman).

**Anne Graham**, Chairman, Consumer Product Safety Commission, Washington, DC. Appointed Government Member on July 8, 1988. Committee on Governmental Processes.

**C. Boyden Gray**, Counsel to the Vice President, Washington, DC. Special Counsel since 1981. Committee on Judicial Review; Committee on Financial Services.

**Darrel J. Grinstead**, Assistant General Counsel, Department of Health and Human Services, Washington, DC. Government Member since 1979. Committee on Administration (Chairman).

**Edith D. Hakola**, General Counsel, National Right to Work Legal Defense Foundation, inc., Springfield, VA. Council Member 1981-1988. Appointed Special Counsel on June 6, 1988. Committee on Adjudication.

**Marshall E. Hanbury**, General Counsel, Commodity Futures Trading Commission, Washington, DC. Government Member since 1987. Committee on Adjudication.

**Marion Edwyn Harrison**, Attorney-at-Law, Washington, DC. Council Member 1971-78; Public Member 1984-85; Senior Fellow 1985-88. Committee on Governmental Processes.

**Michael D. Hawkins**, Esquire, Bryan, Cave, McPheeters & McRoberts, Phoenix, AZ. Appointed Public Member on September 22, 1988. Committee on Rulemaking.

**Alan W. Heifetz**, Chief Administrative Law Judge, Department of Housing and Urban Development, Washington, DC. Government Member (designated ALJ) since 1986. Committee on Adjudication; Model Rules Working Group.

**Hugh Hewitt**, General Counsel, Office of Personnel Management, Washington, DC. Government Member 1986-88. Committee on Governmental Processes.

**Roger A. Hood**, Assistant General Counsel, Federal Deposit Insurance Corporation, Washington, DC. Government Member since 1982. Committee on Governmental Processes; Committee on Financial Services.

**Marian Blank Horn**, Judge, United States Claims Court, Washington, DC. Government Member (Interior) 1984-86; Liaison Representative since 1986. Committee on Governmental Processes.

**S. Neil Hosenball**, Esquire, member of the law firm of Davis, Graham & Stubbs, Washington, DC. Government Member (NASA) 1968-85; Senior Fellow since 1985. Committee on Administration.

**Ernest B. Hueter**, President, National Legal Center for the Public Interest, Washington, DC. Public Member 1986-88. Committee on Judicial Review.

**Lawrence J. Jensen**, General Counsel, Environmental Protection Agency, Washington, DC. Appointed Government Member May 5, 1988. Committee on Regulation.

**Wilford W. Johansen**, Member, National Labor Relations Board, Washington, DC. Government Member since 1985. Committee on Rulemaking.

**Kevin R. Jones**, Deputy Assistant Attorney General, Office of Legal Policy, Department of Justice, Washington, DC. Appointed Government Member on December 2, 1988. Committee on Governmental Processes.

**Paul D. Kamenar**, Director of Litigation, Washington Legal Foundation, Washington, DC. Public Member since 1982. Committee on Rulemaking.

**Eugene M. Katz**, Director, Office of the General Counsel, Federal Home Loan Bank Board, Washington, DC. Government Member appointed on November 29, 1988. Committee on Financial Services.

**Sally Katzen**, Esquire, member of the law firm of Wilmer, Cutler, & Pickering, Washington, DC. Appointed Public Member on August 29, 1988. Committee on Judicial Review.

**Robert M. Kaufman**, Esquire, member of the firm Proskauer, Rose, Goetz & Mendelsohn, New York, NY. Appointed Public Member on August 29, 1988. Committee on Regulation.

**James J. Keightley**, Associate Chief Counsel (Litigation), Internal Revenue Service, Washington, DC. Government Member since 1986. Committee on Regulation.

**Cornelius B. Kennedy**, Esquire, Of Counsel to the law firm of Armstrong, Teasdale, Kramer, Vaughn & Schlafly, Washington, DC. Public Member 1972-82; Senior Fellow since 1982. Committee on Rulemaking.

**Diane S. Killory**, General Counsel, Federal Communications Commission, Washington, DC. Government Member since 1987. Committee on Rulemaking.

**Carolyn B. Kuhl**, member of the law firm of Munger, Tolles, & Olson, Los Angeles, CA. Public Member since 1986. Committee on Administration.

**Dennis J. Lehr**, Esquire, member of the law firm of Hogan & Hartson, Washington, DC. Special Counsel since 1987. Committee on Financial Services.

**Richard J. Leighton**, member of the law firm of Leighton & Regnery, Washington, DC. Public Member since 1983. Committee on Adjudication (Chairman); Model Rules Working Group.

**Daniel R. Levinson**, Chairman, Merit Systems Protection Board, Washington, DC. Government Member (OPM) 1985; Liaison Representative 1986; Government Member (Merit System Protection Board) since 1987. Committee on Governmental Processes.

**Susan W. Liebler**, Chairman, U.S. International Trade Commission, Washington, DC. Government Member 1987-88. Committee on Adjudication.

**Bevis Longstreth**, member of the law firm of Debevoise & Plimpton, New York, NY. Government Member (SEC) 1982-84; Public Member since 1986. Committee on Regulation; Committee on Financial Services.

**Thomas J. Lykos, Jr.**, Minority Counsel, Securities Subcommittee, Senate Committee on Banking, Housing and Urban Affairs, Washington, DC. Special Counsel since 1987. Committee on Financial Services.

**Robert C. MacKichan, Jr.**, General Counsel, General Services Administration, Washington, DC. (ACTION Liaison Representative 1985-87). Appointed Government Member on November 3, 1988. Committee on Judicial Review; Committee on Ethics in Government.

**Howard T. Markey**, Chief Judge, United States Court of Appeals for the Federal Circuit, Washington, DC. Liaison Representative since 1982. Committee on Judicial Review; Committee on Governmental Processes.

**Malcolm S. Mason**, Attorney-at-Law, Washington, DC. Government Member (OEO) 1968-73, (HEW) 1973-79; Senior Fellow since 1984. Since 1985, consultant on handbook for drafting of federal grant statutes. Committee on Administration.

**John J. Mathias**, Administrative Law Judge, U.S. International Trade Commission, Washington, DC. Liaison Representative (Federal Administrative Law Judges Conference) 1987-88. Committee on Governmental Processes.

**William H. McDavid**, General Counsel, Chemical Banking Corporation, New York, NY. (Formerly Vice President and Counsel, Bankers Trust Company, New York, NY.) Special Counsel since 1987. Committee on Financial Services.

**L. Ralph Mecham**, Director, Administrative Office of the U.S. Courts, Washington, DC. Liaison Representative since 1985. Committee on Adjudication.

**James C. Miller III**, Citizen's for a Sound Economy, Washington, DC. Appointed Public Member on October 21, 1988. (Former Director OMB) Council Member 1981-88 (Vice Chairman 1987-88). Committee on Regulation.

**Joseph A. Morris**, Esquire, Mid-America Legal Foundation, Chicago, IL. Government Member (OPM) 1981-85; Liaison Representative (USIA) 1986; Special Counsel (Former Director, Office of Liaison Services, Department of Justice) 1987-88. Appointed Public Member on October 4, 1988. Committee on Judicial Review.

**Alan B. Morrison**, Director, Public Citizen Litigation Group, Washington, DC. Public Member since 1980. Committee on Governmental Processes; Committee on Ethics in Government.

**Trudi M. Morrison**, President, The Morrimount Corporation, Detroit, MI. (formerly located in Arlington, Virginia). Appointed Council Member on June 6, 1988. Committee on Governmental Processes; Committee on Ethics in Government.

**Marvin H. Morse**, Administrative Law Judge, Office of the Chief Administrative Hearing Officer, Department of Justice, Falls Church, VA. Government Member (OPM) 1980-82, (SBA) 1982-84; Liaison Representative 1985-87 (ABA National Conference of ALJs); Appointed Liaison Representative (Federal Bar Association) on June 8, 1988. Committee on Rulemaking; Committee on Adjudication.

**David E. Nething**, Majority Leader, North Dakota State Senate, Jamestown, ND. Liaison Representative (Advisory Commission on Intergovernmental Relations) since 1983. Committee on Regulation.

**Don M. Newman**, Under Secretary, Department of Health and Human Services, Washington, DC. Government Member since 1987. Committee on Adjudication.

**Charles W. Nihan**, Deputy Director, Federal Judicial Center, Washington, DC. Liaison Representative since 1984. Committee on Judicial Review.

**Lawrence M. Noble**, General Counsel, Federal Election Commission, Washington, DC. Appointed Government Member on August 22, 1988. Committee on Judicial Review.

**John E. O'Brien**, General Counsel, National Aeronautics and Space Administration, Washington, DC. Government Member 1985-88. Committee on Administration.

**Alice L. O'Donnell**, Director, Division of Interjudicial Affairs and Information Services, Federal Judicial Center, Washington, DC. Liaison Representative 1976-84; Special Counsel since 1984. Committee on Judicial Review.

**Daniel Oliver**, Chairman, Federal Trade Commission, Washington, DC. Government Member (Education) 1983; Council Member since 1983. Committee on Adjudication.

**Owen Olpin**, Esquire, member of the law firm of O'Melveny & Myers, Los Angeles, CA. Public Member 1972-82; Senior Fellow since 1982. Committee on Regulation.

**Earl R. Ohman, Jr.**, General Counsel, Occupational Safety and Health Review Commission, Washington, DC. Appointed Government Member on March 28, 1988. Committee on Judicial Review.

**Max D. Paglin**, Attorney-at-Law, Washington, DC. Government Member (FCC) 1968-72, (Atomic Energy Commission) 1972-74, (NRC) 1974-75. Consultant on: implementation of ACUS recommendations (1975-76); natural gas shortages (Statement 5 - 1976); management seminars for agency officials (1976); agency procedural review (1977). Public Member 1978-82; Senior Fellow since 1982. Committee on Judicial Review.

**William C. Parler**, General Counsel, Nuclear Regulatory Commission, Washington, DC. Government Member since 1987. Committee on Rulemaking.

**Sallyanne Payton**, Associate Professor, University of Michigan School of Law, Ann Arbor, MI. Public Member 1980-88. Appointed Senior Fellow October 6, 1988. Committee on Administration; Committee on Rulemaking.

**Clyde C. Pearce, Jr.**, General Counsel, General Services Administration, Washington, DC. Government Member 1986-88. Committee on Administration.

**Donald H. Pearlman**, Executive Assistant to the Secretary, Department of the Interior, Washington, DC. Government Member 1986-88. Committee on Rulemaking (Vice Chairman).

**John A. Pendergrass**, Assistant Secretary for Occupational Safety & Health Administration, Department of Labor, Washington, DC. Government Member since 1987. Committee on Regulation.

**William E. Persina**, Acting Solicitor, Federal Labor Relations Authority, Washington, DC. Appointed Liaison Representative on October 18, 1988. Committee on Adjudication.

**Aulana L. Peters**, Commissioner, Securities and Exchange Commission, Washington, DC. Government Member 1984-88. Committee on Adjudication.

**Ruth E. Peters**, Solicitor, Federal Labor Relations Authority, Washington, DC. Liaison Representative 1987-88. Committee on Adjudication.

**Harvey Lloyd Pitt**, Esquire, member of the law firm of Fried, Frank, Harris, Shriver & Jacobson, Washington, DC. Public Member 1986-88. Committee on Adjudication; Committee on Financial Services.

**R. David Pittle**, PhD, Technical Director, Consumers Union of the United States, Mount Vernon, NY. Appointed Public Member on August 29, 1988. Committee on Governmental Processes.

**S. Jay Plager**, Administrator, Information and Regulatory Affairs, Office of Management & Budget, Washington, DC. Appointed Government Member on July 6, 1988. Committee on Rulemaking.

**Monroe F. Price**, Dean, Cardozo Law School, New York, NY. Public Member 1986-88. Committee on Regulation.

**William T. Quillen**, Vice President and General Counsel, Howard Hughes Medical Institute, Bethesda, MD. Public Member 1982-86; Special Counsel since 1986. Committee on Adjudication.

**Bruce Rabb**, Esquire, member of the law firm of Stroock & Stroock & Lavan, New York, NY. Public Member 1982-86; Special Counsel 1986-88. Reappointed Public Member on September 22, 1988. Committee on Adjudication.

**Edward D. Re**, Chief Judge, United States Court of International Trade, New York, NY. Liaison Representative since 1984. Committee on Rulemaking.

**William Bradford Reynolds**, Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, DC. Government Member 1984-88. Committee on Governmental Processes.

**Kathleen D. Ribaud**, Attorney Advisor to Chairman Heather J. Gradison, Interstate Commerce Commission, Washington, DC. Appointed Government Member September 15, 1988. Committee on Judicial Review.

**James R. Richards**, Inspector General, Department of the Interior, Washington, DC. Government Member (Energy) 1984-86; (designated Inspector General since 1987). Committee on Governmental Processes.

**Ronald E. Robertson**, Professor, School of Law, Pepperdine University, Malibu, CA (formerly General Counsel, Department of Health and Human Services, Washington, DC.) Public Member 1982-85; Special Counsel since 1985. Committee on Administration; Committee on Ethics in Government.

**Reuben B. Robertson III**, Esquire, member of the law firm of Ingersoll & Bloch, Washington, DC. Chairman of the Administrative Conference of the United States 1980-81; Senior Fellow since 1982. Committee on Adjudication.

**William R. Robie**, Chief Immigration Judge, Executive Office for Immigration Review, Department of Justice, Falls Church, VA. Liaison Representative since 1984. Committee on Rulemaking; Model Rules Working Group.

**Victor G. Rosenblum**, Professor of Law, Northwestern University School of Law, Chicago, IL. Consultant on: citizen complaints (1971); ALJ study (1974-76); and evaluation of ALJ performance (1979-85). Public Member since 1982. Committee on Administration; Advisory Committee on Administrative Procedures Under the U.S.-Canada Free Trade Agreement (Chairman).

**Harold L. Russell**, Esquire, member of the law firm of Smith, Gambrell & Russell, Atlanta, GA. Council Member 1968-77; Senior Fellow since 1983. Committee on Judicial Review.

**Raymond Carter Sanders, Jr.**, Senior Partner, Sanders & Associates, Washington, DC. Appointed Council Member on June 6, 1988. Committee on Judicial Review.

**Antonin Scalia**, Associate Justice, United States Supreme Court, Washington, DC. Chairman of the Administrative Conference of the United States 1972-74; Public Member 1978-82; Senior Fellow since 1982. Committee on Governmental Processes.

**Edward C. Schmults**, Senior Vice President for External Affairs and General Counsel, GTE Corporation, Stamford, CT. Public Member 1987-88. Committee on Judicial Review.

**R. Gaull Silberman**, Vice Chairman, Equal Employment Opportunity Commission, Washington, DC. Appointed Government Member on January 5, 1988. Committee on Governmental Processes; Committee on Administration.

**Loren A. Smith**, Chief Judge, United States Claims Court, Washington, DC. Chairman of the Administrative Conference of the United States 1981-85; Senior Fellow since 1985. Committee on Judicial Review.

**Otis M. Smith**, Esquire, Lewis, White & Clay, Detroit, MI. Public Member 1972-78; Council Member 1978-88; appointed Senior Fellow on June 6, 1988. Committee on Judicial Review.

**Willis B. Snell**, Esquire, member of the law firm of Sutherland, Asbill & Brennan, Washington, DC. Liaison Representative (ABA Administrative Law Section) 1984-88. Committee on Regulation.

**Abraham D. Sofaer**, Legal Adviser, Department of State, Washington, DC. Consultant on change-of-status applications to INS (Recommendation 71-5). Government Member since 1985. Committee on Adjudication; Advisory Committee on Administrative Procedures Under the U.S.-Canada Free Trade Agreement.

**Stanley Sporkin**, Judge, United States District Court for the District of Columbia, Washington, DC. Liaison Representative (CIA) 1982-85; Special Counsel since 1986. Committee on Rulemaking; Committee on Financial Services (Vice Chairman).

**Kenneth W. Starr**, Judge, U.S. Court of Appeals for the District of Columbia, Washington, DC. Appointed Liaison Representative (Judicial Conference) on October 11, 1988. Committee on Judicial Review.

**Janet D. Steiger**, Chairman, Postal Rate Commission, Washington, DC. Liaison Representative since 1981. Committee on Rulemaking.

**Jay B. Stephens**, Deputy Counsel to the President, The White House, Washington, DC. Liaison Representative (Executive Office of the President) 1986-88. Committee on Governmental Processes.

**Malcolm M. B. Sterrett**, Commissioner, Interstate Commerce Commission, Washington, DC. Government Member since 1986. Committee on Judicial Review.

**Peter L. Strauss**, Professor of Law, Columbia University School of Law, New York, NY.. Consultant on: mining claims on public lands (Recommendation 74-3); impact of judicial review on rulemaking (1977-78); and disqualification of decisional officials (Recommendation 80-4). Government Member (NRC) 1976-77; Public Member since 1982. Committee on Judicial Review (Vice Chairman).

**James M. Strook**, General Counsel, Office of Personnel Management, Washington, DC. Appointed Government Member on July 21, 1988. Committee on Governmental Processes.

**Mark Sullivan III**, Associate Director, Presidential Personnel, The White House, Washington, DC. Council Member since 1986. Committee on Judicial Review; Committee on Financial Services.

**Thomas M. Susman**, Esquire, member of the law firm of Ropes & Gray, Washington, DC. Public Member since 1980. Committee on Judicial Review (Chairman).

**Frank S. Swain**, Chief Counsel for Advocacy, Small Business Administration, Washington, DC. Government Member since 1982. Committee on Regulation.

**Scott E. Thomas**, Chairman, Federal Election Commission, Washington, DC. Government Member 1987-88. Committee on Adjudication.

**James P. Timony**, Administrative Law Judge, Federal Trade Commission, Washington, DC. Appointed Liaison Representative (First Vice President, Federal Administrative Law Judges Conference) on June 1, 1988. Committee on Judicial Review.

**Phillip N. Truluck**, Executive Vice President, The Heritage Foundation, Washington, DC. Public Member since 1986. Committee on Rulemaking; Committee on Ethics in Government.

**William L. Van Lenten**, Senior Attorney, Federal Home Loan Bank Board, Washington, DC. Government Member 1986-88. Committee on Judicial Review.

**Paul R. Verkuil**, President, College of William and Mary, Williamsburg, VA. Consultant on: pre-enforcement judicial review of rules (Recommendation 74-4); informal adjudication (1975-76); intergovernmental communications in informal rulemaking (Recommendation 80-6); Regulatory Flexibility Act (1981); judicial review of rules in enforcement proceedings (Recommendation 82-7); and immigration adjudications (1983-84). Public Member since 1982. Committee on Governmental Processes; Committee on Rulemaking.

**John M. Vittone**, Office of Administrative Law Judges, Department of Labor, Washington, DC. Appointed Liaison Representative (Chairman, American Bar Association National Conference of Administrative Law Judges) on September 1, 1988. Committee on Rulemaking; Model Rules Working Group.

**Gregory S. Walden**, Chief Counsel, Federal Aviation Administration, Department of Transportation, Washington, DC. Appointed Government Member on July 15, 1988. Committee on Rulemaking.

**John M. Walker, Jr.**, Judge, United States District Court for the Southern District of New York, New York, NY. Special Counsel since 1986. Committee on Regulation; Committee on Financial Services; Advisory Committee on Administrative Procedures Under the U.S.-Canada Free Trade Agreement.

**Michael B. Wallace**, Esquire, member of the firm Phelps, Dunbar, Marks, Clazerie & Simms of Jackson, Mississippi. Public Member 1984-86 and since 1987. Committee on Regulation.

**Edward L. Weidenfeld**, Attorney-at-Law, Washington, DC. Council Member since 1981. Committee on Regulation.

**Harris Weinstein**, Esquire, member of the law firm of Covington & Burling, Washington, DC. Public Member since 1982. Committee on Governmental Processes (Chairman).

**Jonathan A. Weiss**, Director, Legal Services for the Elderly, New York, NY. Public Member since 1987. Committee on Adjudication.

**Stephen A. Weitzman**, Attorney-at-Law, Birch, Stewart, Kolasch & Birch, Falls Church, VA. Public Member 1984-88. Committee on Regulation.

**James E. Wesner**, Esquire, member of the law firm of Ginsburg, Feldman, Weil & Bress, Washington, DC. Public Member 1974-82; Senior Fellow since 1982. Committee on Adjudication.

**Richard E. Wiley**, Senior Partner of the law firm of Wiley, Rein & Fielding, Washington, DC. Council Member 1973-77; Public Member 1979-84; Senior Fellow since 1984. Committee on Governmental Processes.

**Henry N. Williams**, General Counsel, Selective Service System, Washington, DC. Government Member (SSS) 1971-75; Liaison Representative since 1975. Committee on Adjudication.

**Jerre S. Williams**, Judge, United States Court of Appeals for the Fifth Circuit, Austin, TX. Chairman of the Administrative Conference of the United States 1968-70; Public Member 1972-78; Senior Fellow since 1982. Committee on Judicial Review.

**Paul E. Williams**, Chairman, Armed Services Board of Contract Appeals, Department of Defense, Falls Church, VA. Appointed Government Member January 8, 1988 (designated Board of Contract Appeals Member). Committee on Administration.

**Wendell L. Willkie II**, General Counsel, Department of Education, Washington, DC. Government Member 1986-88. Committee on Governmental Processes.

**D. Edward Wilson**, Acting General Counsel, Department of the Treasury, Washington, DC. Government Member 1987-88. Committee on Financial Services.

**Frank M. Wozencraft**, Esquire, member of the law firm of Baker & Botts, Houston, TX. Council Member (Vice Chairman) 1968-71; Public Member 1975-80; Senior Fellow since 1982. Committee on Regulation.

**Frank E. Young**, Commissioner, Food and Drug Administration, Department of Health and Human Services, Rockville, MD. Government Member since 1987. Committee on Rulemaking.

**Seth D. Zinman**, Associate Solicitor, Department of Labor, Washington, DC. Government Member since 1981. Committee on Judicial Review.

## RESEARCH CONSULTANTS

**Alfred C. Aman, Jr.**, Professor of Law, Cornell Law School, Ithaca, NY. Consultant on: enforcement of petroleum price regulations (Recommendation 80-2); since 1986, handling of applications under the bank holding company act by the Federal Reserve Board (Recommendation 88-3).

**Frederick R. Anderson**, Professor of Law, Washington College of Law, American University, Washington, DC. Consultant on revolving funds for remedial and compensatory purposes.

**Dennis S. Aronowitz**, Professor of Law and Director, Morin Center for Banking Law Studies, Boston University School of Law, Boston, MA. Consultant on: Renegotiation Act (Recommendation 70-5); banking agency informal regulatory techniques (since 1986).

**Michael Baram**, Director, Center for Law & Technology, Boston University School of Law, Boston, MA. Consultant on risk communication as a regulatory approach.

**Lawrence G. Baxter**, Professor of Law, Duke University Law School. Since 1987, consultant on resolution of claims against savings receiverships (Recommendation 88-8).

**Richard J. Bednar**, Esquire, Crowell & Moring, Washington, DC. Pro bono consultant on use of ADR by agency contracting officers.

**Richard K. Berg**, Senior Counsel, Multinational Legal Services, P.C., Washington, DC. General Counsel of the Administrative Conference of the United States (1971-87). Consultant on: subpoena powers in formal agency proceedings (Recommendation 74-1); statutory and regulatory inhibitions to agency use of arbitration (since 1987); application of conflict-of-interest laws to federal advisory committee members.

**Charles A. Bethel**, Mediator, Takoma Park, Maryland. Consultant on: Training of federal officials in ADR.

**Frank S. Bloch**, Professor, School of Law, Vanderbilt University, Nashville, TN. Consultant on use of medically trained deciders in disability cases.

**Harold H. Bruff**, Professor of Law, University of Texas School of Law, Austin, TX. Consultant on: mandatory retirement of presidential appointees (Recommendation 76-1); legislative veto (Recommendation 77-1); arbitration in federal programs (Recommendation 87-5); presidential review of agency rulemaking (Recommendation 88-9).

**William J. Chambliss**, Professor, Department of Sociology, George Washington University, Washington, DC. Consultant on impact of ethics laws on recruitment of presidential appointees.

**Michael P. Cox**, Dean, Thomas M. Cooley Law School, Lansing, MI. Consultant on: discipline of attorneys practicing before federal agencies (Statement 8 - 1982); feasibility of a center for state administrative law (1986); model rules of practice for agency adjudication.

**Colin S. Diver**, Associate Dean, Boston University School of Law, Boston, MA. Consultant on: civil money penalties (Recommendation 79-3); policy articulation (Statement 9 - 1983); since 1984, division of roles in joint federal/state regulatory programs.

**E. Donald Elliott**, Professor of Law, Yale Law School, New Haven, CT. Since 1986, consultant on judicial remands of cases to administrative agencies.

**Samuel Estreicher**, Professor of Law, New York University School of Law, New York, NY. Since 1986, consultant on federal agency nonacquiescence in decisions of reviewing courts.

**Michelle L. Gilbert**, Esquire, member of the firm Akin, Gump, Strauss, Hauer & Feld, Washington, DC. Pro bono consultant on agency use of settlement judges (Recommendation 88-5).

**Margaret Gilhooley**, Professor of Law, Seton Hall University School of Law, Newark, NJ. Consultant on agency practices in indexing and making available their adjudicatory decisions.

**Clayton P. Gillette**, Professor of Law, Boston University School of Law, Boston, MA. Consultant on: user fees (Recommendation 87-4); since 1987, valuation of human life in regulatory decisionmaking (Recommendation 88-7).

**Frank P. Grad**, Director, Legislative Drafting Research Fund, Columbia University School of Law, New York, NY. Since 1986, consultant on federal government indemnification of government contractors (Recommendation 88-2).

**Susan G. Hadden**, Professor, Lyndon B. Johnson School of Public Affairs, University of Texas, Austin, TX. Consultant on computers and community right to know.

**Philip J. Harter**, Attorney-at-Law, Washington, DC. Consultant on: negotiated rulemaking (Recommendation 82-4); alternatives to regulation (1982-84); alternative dispute resolution (Recommendation 86-3); code of conduct for presidential transition workers (Recommendation 88-1); encouraging settlements by protecting mediator confidentiality (Recommendation 88-11).

**Thomas D. Hopkins**, Professor of Economics, Rochester Institute of Technology, Rochester, NY. Consultant on: user fees (Recommendations 87-4); since 1987, valuation of human life in regulatory decisionmaking (Recommendation 88-7).

**Daniel Joseph**, Esquire, member of the law firm of Akin, Gump, Strauss, Hauer & Feld, Washington, DC. Since 1986, pro bono consultant on agency use of settlement judges (Recommendation 88-5).

**Timothy S. Jost**, Professor, College of Law, Ohio State University, Columbus, OH. Consultant on role of peer review organizations in the Medicare program.

**Eleanor D. Kinney**, Director, Program for Law, Medicine, and the Health Care Industry, Indiana University School of Law, Indianapolis, IN. Consultant on: Medicare appeals (Recommendation 86-5); national coverage determinations under Medicare (Recommendation 87-8); the Medicare program - aspects of procedure and federalism.

**Andreas F. Lowenfeld**, Professor of Law, New York University School of Law, New York, NY. Consultant on dispute resolution mechanisms under the US-Canada Free Trade Agreement.

**William V. Luneburg**, Professor of Law, University of Pittsburgh School of Law, Pittsburgh, PA. Consultant on: petitions for rulemaking (Recommendation 86-6); agency use of private attorneys (Recommendation 87-3); the federal employee grievance and personnel appeals process.

**Jonathan R. Macey**, Professor of Law, School of Law, Cornell University, Ithaca, NY. Since 1986, consultant on regulation of bank failures.

**Michael P. Malloy**, Professor of Law, Fordham University, New York, NY. Consultant on adjudication practices and procedures of the federal banking agencies (Recommendation 87-12); administration of the Securities Exchange Act of 1934 by the bank regulatory agencies.

**David A. Martin**, Professor of Law, University of Virginia School of Law, Charlottesville, VA. Consultant on asylum adjudication procedures.

**Richard Mays**, Esquire, Vice President, ICF Incorporated, Fairfax, VA. Consultant on arbitration in environmental enforcement.

**Geoffrey P. Miller**, Professor of Law, University of Chicago School of Law, Chicago, IL. Since 1986, consultant on regulation of bank failures.

**Marguerite S. Millhauser**, Esquire, Washington, DC. Consultant on ADR Roundtables for federal officials.

**Benjamin Mintz**, Professor, School of Law, Catholic University of America, Washington, DC. Consultant on updating Guide to Federal Agency Rulemaking.

**Thomas D. Morgan**, Professor of Law, Emory University School of Law, Atlanta, GA. Consultant on: ratemaking delay (Recommendation 78-1); conflict of interest for government officials (Recommendation 79-7); examination of "regulatory budget" concept (1985-87); revision of federal financial disclosure requirements.

**James A.R. Nafziger**, Professor, College of Law, Willamette University, Salem, OR. Consultant on reviewability of consular officers' denials of visa applications.

**Ralph C. Nash**, Professor of Law, National Law Center, George Washington University, Washington, DC. Consultant on ADR training.

**David S. North**, Project Director, TransCentury Development Associates, Washington, DC. Consultant on a review of the alien legalization program.

**Gregory L. Ogden**, Professor, School of Law, Pepperdine University, Malibu, CA. Consultant on agency standards of conduct for employees.

**Henry H. Perritt, Jr.**, Professor of Law, Villanova University School of Law, Villanova, PA. Consultant on: experience with negotiated rulemaking (Recommendation 85-5); federal agency use of computers in acquiring and releasing information (Recommendation 88-10).

**Richard L. Revesz**, Professor of Law, New York University School of Law, New York, NY. Since 1986, consultant on federal agency nonacquiescence in decisions of reviewing courts.

**Robert N. Roberts**, Professor, Department of Political Science, James Madison University, Harrisonburg, VA. Consultant on government ethics matters.

**Ronald D. Rotunda**, Professor of Law, University of Illinois College of Law, Champaign, IL. Consultant on agency use of private attorneys (Recommendation 87-3); government ethics briefing book.

**Thomas O. Sargentich**, Professor of Law, Washington College of Law, American University, Washington, DC. Since 1986, consultant on judicial review of preliminary challenges to agency action (Recommendation 88-6).

**Peter H. Schuck**, Professor of Law, Yale Law School, New Haven, CT. Consultant on: formulation of policy through exceptions process (Statement 10 - 1983); judicial remands of cases to administrative agencies (since 1986).

**Jay M. Shafritz**, Professor, Graduate School of Public and International Affairs, University of Pittsburgh, Wexford, PA. Consultant on the federal employee grievance and personnel appeals process.

**Peter M. Shane**, Professor of Law, University of Iowa College of Law, Iowa City, IA. Consultant on congressional access to confidential agency information.

**Sidney A. Shapiro**, Professor of Law, University of Kansas School of Law, Lawrence, KS. Consultant on: OSHA rulemaking (Recommendation 87-1); regulation by OSHA (Recommendation 87-10); federal regulation of biotechnology.

**Stuart A. Smith**, Esquire, Shea & Gould, New York, NY. Pro bono consultant on deferred taxation for conflict-of-interest divestitures (Recommendation 88-4).

**Marianne K. Smythe**, Professor of Law, University of North Carolina School of Law, Chapel Hill, NC. Since 1986, consultant on Commodity Futures Trading Commission's dispute resolution procedures for adjudicating reparations cases. (Statement 13, 1988).

**Diane M. Stockton**, Fairfax, VA. Consultant on ADR (Recommendation 87-11) and Administrative Procedures Under the U.S.-Canada Free Trade Agreement.



*Council member Trudi M. Morrison President of The Morrimount Corporation intent on presentation of recommendation at plenary session.*

## APPENDIX C - STAFF OF THE OFFICE OF THE CHAIRMAN

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*Chairman* MARSHALL J. BREGER  
*Senior Special Assistant to the Chairman* CATHERINE Z. GILDENHORN\*  
 NEIL J. KRITZ  
*Secretary to the Chairman* DOROTHEA R. COLLINS

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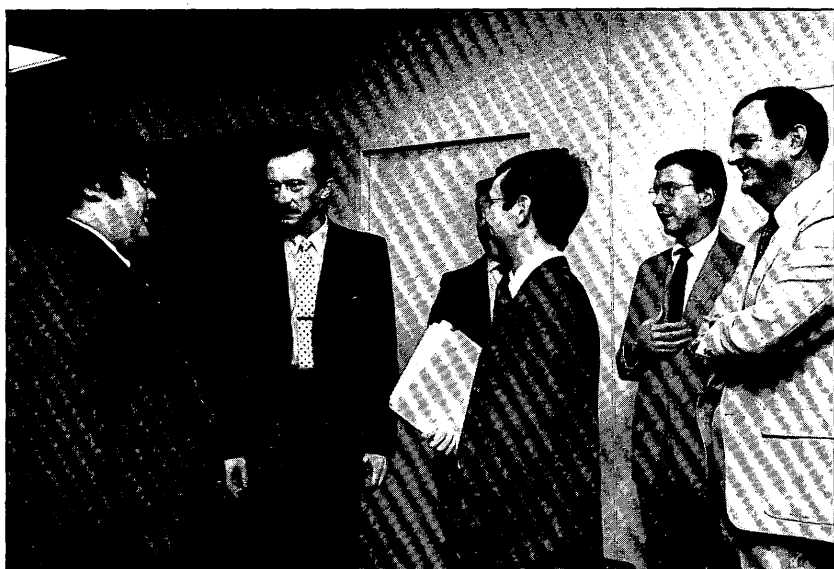
*Executive Director* WILLIAM J. OLMSTEAD  
*General Counsel* GARY J. EDLES  
*Research Director* JEFFREY S. LUBBERS  
*Deputy Research Director* MICHAEL W. BOWERS  
*Distinguished Visiting Fellow* WALLACE P. WARFIELD  
*Senior Attorney* CHARLES E. POUL, JR.  
*Staff Attorneys* MARY CANDACE FOWLER  
 SARA A. GORDON\*  
 KEVIN L. JESSAR  
 NANCY G. MILLER  
 BRIAN C. MURPHY  
 DAVID M. PRITZKER  
 DEBORAH G. ROSS\*  
*Director of Administration* DANIEL F. MANN  
*Administrative Officer* NORMA B. SMITH  
*Librarian/Information Officer* JEAN R. CONRAD  
*Library Technician* CAROLE B. BROWN  
*Systems Administrator* GLORIA J. COFFEY  
*Secretarial Staff* SHARON D. ANDERSON  
 GINA K. JACKSON  
 JENNIFER E. LABONTE\*  
 SUSAN M. MACK  
 EUNICE M. SAMPLE  
 KARYN A. ZAAZENGA\*  
*Receptionist* THERESA CHARLENE YOUNG  
*Legal Intern* LINDA ROY-SNOWBALL  
*Paralegal Specialist* ROBERT H. PORTNOE\*  
*Clerk Typists* BERTHA C. BROWN  
 MATTHEW M. CRISPINO\*

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\* Resigned in 1988.



*Staff attorney Brian C. Murphy conversing with consultant Richard K. Berg.*



*Vasiliy Vlasihin, Head of Legal Studies, Insititute of U.S. & Canadian Studies, USSR Academy of Sciences talking with Chairman Breger, Special Assistant Neil J. Kritz, Craig Baab, American Bar Association, and William J. Olmstead, Executive Director of the Conference at a meeting with Soviet legal officials.*

## **APPENDIX D - ORGANIZATION AND OPERATION**

The Administrative Conference of the United States identifies causes of inefficiency, delay, and unfairness in administrative proceedings affecting private rights and recommends improvements to the President, federal agencies, the Congress, and the courts. Established as a permanent independent federal agency by the Administrative Conference Act of 1964 (5 U.S. Code 571-576), the Conference was activated by the appointment of its first Chairman in January 1968. The bylaws and statutes governing the organization and operation of the Conference appear in this report's Appendices G and H, respectively.

The Conference is a membership organization consisting of three related parts: the Office of the Chairman, the Council, and the Assembly.

### **THE OFFICE OF THE CHAIRMAN**

The Chairman of the Administrative Conference is the chief executive of the Conference and its only compensated member. Appointed by the President, with the advice and consent of the Senate, the Chairman serves for a term of 5 years. Marshall J. Breger, the seventh Chairman of the Administrative Conference, was appointed by President Ronald Reagan on October 17, 1985.

The Chairman, with the approval of the Council, appoints the public members of the Conference. He presides at plenary sessions of the Assembly and at Council meetings, and is the official spokesman for the Conference in relations with the President, the Congress, the judiciary, the agencies, and the public. The Chairman has authority to investigate matters brought to his attention by individuals inside and outside government, and to designate subjects for Conference recommendations. The Chairman is served by a small permanent staff, which furnishes administrative and research support to the Assembly and committees of the Conference, provides guidance and assistance to

research consultants, and helps the Chairman in securing implementation of recommendations and in providing advice and assistance to agencies and to committees of the Congress.

## **THE COUNCIL**

The Council consists of the Chairman and 10 other members, not more than one-half of whom may be employees of federal agencies, who are appointed by the President for 3-year terms. The Council performs functions similar to those of a corporate board of directors. It calls plenary sessions of the Conference and fixes their agendas, recommends subjects for study, receives and considers reports and recommendations before they are considered by the Assembly, and exercises general budgetary and policy supervision.

In 1987, President Reagan appointed James C. Miller III, Director of the Office of Management and Budget, to the position of Vice Chairman, and James H. Burnley IV, Secretary of Transportation, to a position on the Council. Council Member William R. Jackson resigned, leaving a total of nine council members in addition to the Chairman at the end of 1987.

## **THE ASSEMBLY**

### **Structure of the Assembly**

The members of the Conference, when meeting in plenary session, constitute the Assembly of the Conference. The number of members, by statute, may not be fewer than 75 nor more than 101.<sup>1</sup> At the end of 1988, the Conference had 89 members. In addition to the Council, members fall into three groups: (i) those designated by statute; (ii) those designated by the President; and (iii) those appointed by the Chairman. In addition, a number of individuals serve in a non-voting status as liaison representatives, senior fellows, or special counsels.

### **Statutory Members**

The Administrative Conference Act confers membership upon the chairman of each independent regulatory board or commission or a person designated by the agency (5 U.S. Code 573(b)(2)). The boards and commissions having statutory members include:

Commodity Futures Trading Commission  
Consumer Product Safety Commission  
Federal Communications Commission  
Federal Election Commission

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1. Prior to amendment of the Administrative Conference Act by Public Law 99-170 on October 11, 1986, the maximum number of members had been set at 91.

Federal Energy Regulatory Commission  
Federal Home Loan Bank Board  
Federal Maritime Commission  
Federal Reserve System  
Federal Trade Commission  
Interstate Commerce Commission  
National Labor Relations Board  
Nuclear Regulatory Commission  
Securities and Exchange Commission

### **Agencies Designated by the President**

The Administrative Conference Act grants membership to the head (or the designee of the head) of each executive department or other administrative agency designated for this purpose by the President (5 U.S. Code 573(b)(3)). Under this authority, the President has designated 13 Cabinet departments for membership, and the Council has acted to provide 5 additional memberships from 4 of these departments having subcomponents with special regulatory responsibilities. In addition, in 1988, rotating memberships were held by the Department of Housing and Urban Development for an administrative law judge and by the Department of the Interior for an inspector general. The Council also authorized in 1988 a rotating membership position for a member of a board of contract appeals. The President has also designated 14 other administrative agencies for membership, including the Merit Systems Protection Board and the U.S. International Trade Commission, both of which had held liaison representative status prior to 1987. One of these 35 positions was vacant at the end of 1988.

Cabinet departments include:

- Department of Agriculture
- Department of Commerce
- Department of Defense (includes member of Board of Contract Appeals)
- Department of Education
- Department of Energy
- Department of Health and Human Services  
(includes Food and Drug Administration  
and an additional membership position)
- Department of Housing and Urban Development  
(includes administrative law judge)
- Department of the Interior (includes inspector general)
- Department of Justice
- Department of Labor (includes Occupational  
Safety and Health Administration)

Department of State  
Department of Transportation (includes Federal  
Aviation Administration)  
Department of the Treasury  
(includes Internal Revenue Service)

Administrative agencies include:

Commission on Civil Rights  
Environmental Protection Agency  
Equal Employment Opportunity Commission<sup>1</sup>  
Federal Deposit Insurance Corporation  
General Services Administration  
Merit Systems Protection Board<sup>2</sup>  
National Aeronautics and Space Administration  
Occupational Safety and Health Review Commission  
Office of Management and Budget  
Office of Personnel Management  
Small Business Administration  
U.S. International Trade Commission<sup>2</sup>  
U.S. Postal Service  
Veterans Administration

### **Public Members**

This group consists of members appointed for 2-year terms by the Chairman, with the approval of the Council. These "non-government" members, who are required by the Administrative Conference Act to comprise not less than one-third nor more than two-fifths of the total membership, are selected to provide broad representation of the views of private citizens of diverse experience. They are chosen from among members of the practicing bar, scholars in the field of administrative law or government, and others specially informed with respect to federal administrative procedure. They are reimbursed for travel expenses but otherwise serve without compensation.

At the close of 1988 the public members numbered 37. Public members are limited to no more than four terms of continuous service (1 C.F.R. 302.2(b)).

In 1986, the bylaws of the Conference were amended to require that the terms of one-half of the public members expire in each calendar year, replacing the prior requirement that all terms expire in even-numbered years. During 1987, the Chairman designated by random selection those current members whose terms expire on June 30, 1989. The terms of all other incumbent public members expired on June 30, 1988.

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1. Position vacant during 1988.

2. Formerly liaison representative status.

## **Senior Fellows**

Under section 2(e) of the bylaws (1 C.F.R. 302.2(e)), former chairmen of the Conference and individuals who have served for 8 or more years as members are eligible for 2-year appointments as senior fellows. Senior fellows are assigned to committees and participate in other Conference functions as members, but have no vote.

## **Liaison Representatives**

The Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the judiciary, federal agencies not otherwise represented in the Conference, and professional associations (1 C.F.R. 302.4). Individuals who serve in such a capacity participate in the activities of the Conference, having privileges of the floor at committee meetings and plenary sessions, but have no vote. At the close of 1988 the number of liaison representatives numbered 23. Organizations with liaison representation are:

### *Judiciary*

- Administrative Office of the U.S. Courts
- Federal Judicial Center
- Judicial Conference of the U.S.
- U.S. Claims Court
- U.S. Court of Appeals for the Federal Circuit
- U.S. Court of International Trade
- U.S. Court of Military Appeals

### *Federal Agencies*

#### **ACTION**

- Advisory Commission on Intergovernmental Relations
- Executive Office for Immigration Review
- Council on Environmental Quality
- Executive Office of the President
- Federal Labor Relations Authority
- Federal Mediation and Conciliation Service
- Federal Mine Safety and Health Review Commission
- General Accounting Office
- Office of the Federal Register
- Pension Benefit Guaranty Corporation
- Postal Rate Commission
- Selective Service System

ABA Administrative Law Section  
ABA National Conference of Administrative Law Judges  
Federal Administrative Law Judges Conference

### **Special Counsels**

From time to time, the Chairman designates individuals to the position of Special Counsel to the Administrative Conference. These persons, who do not serve under any of the other official membership designations, advise and assist the membership in areas of their special expertise. Twelve Special Counsel appointments were in effect for portions of 1988. (See Appendix A for list of Special Counsels.)

### **Operation of the Assembly**

The Assembly, which has ultimate authority over all activities of the Conference, operates much like a legislative body. Through the adoption of bylaws, the Assembly has established six standing committees to work on individual Conference projects. In addition, the Chairman from time to time establishes "special" committees to concentrate on certain timely issues, and two such committees were created in 1987: the Special Committee on Financial Affairs and the Special Committee on Ethics in Government. The committees are the most important component of the process that leads to the adoption of Conference recommendations, since it is at the committee level that consultants' reports are first analyzed and proposed recommendations are formulated.

## **THE COMMITTEES**

Committees meet periodically to plan and guide research by academic and professional consultants and by the Chairman's professional staff. On the basis of this research, along with public and agency input through written comments and, where appropriate, public hearings, the committees frame proposed recommendations for consideration by the Assembly. When a study and tentative recommendation have been prepared, these are circulated to the affected agencies and announced to the public for comment, then reexamined by the committee in light of the replies.

After final committee approval, a proposed recommendation is transmitted to the Council and then to the Assembly for consideration in plenary session. The Assembly may either adopt the recommendation in the form proposed by the committee, amend the recommendation, refer it to committee, table it, or reject it entirely.

Since January 1968, the Assembly of the Conference has adopted 137 recommendations. Eleven recommendations were adopted during 1988. Occasionally, the Assembly acts to state its views on a particular matter without making a formal recommendation on the subject. Twelve of these "statements" have been adopted by the Conference since 1968. One statement was adopted in 1988. The recommendations and the statement of the Conference adopted during 1988 are reproduced in full in Appendix E of this report.

The official actions of the Conference, along with related research reports, are published in the annual series *ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS*. Recommendations and statements (but not reports) are also published in the *FEDERAL REGISTER*, and those of continuing interest in the *CODE OF FEDERAL REGULATIONS* Title 1, Parts 305 and 310.

### **Committee Activities**

The COMMITTEE ON ADJUDICATION, chaired by Richard J. Leighton, devoted most of its effort to a study of administrative law issues involving the use of medical peer review organizations in the Medicare program.

The central feature of this study, prepared by Timothy S. Jost, Professor of Law at Ohio State University, was a recommendation for changes in the way peer review organizations (PROs) and the Department of Health and Human Services jointly propose and adjudicate sanctions against physicians and providers who are charged with providing improper care or unnecessary services in the Medicare program.

The Committee proposed a recommendation for the December plenary session that was debated, but ultimately deferred to the next session. The medical community has paid a great deal of attention to the recommendation, which should be on the agenda in the June 1989 plenary session.

Committee research plans for 1989 include two immigration-related studies: adjudication of legalization applications and reviews of consular denials of visa applications.

The COMMITTEE ON ADMINISTRATION, chaired by Darrel J. Grinstead, completed research on three projects leading to Conference action in 1988. The Committee's primary focus during that period involved issues in federal agencies' use of alternative means of dispute resolution (ADR). One study, done *pro bono* by Daniel Joseph and Michelle Gilbert of the Washington office of the firm of Akin, Gump, Strauss, Hauer & Feld, furnished guidelines on the use of settlement judges. The study, and the resulting Conference recommendation, call

for federal agencies to offer the services of a separate settlement judge--not the presiding judge in the case--to help the parties reach agreement. The recommendation also suggests procedures for implementing the settlement judge device. A second report, by Philip J. Harter of Washington, DC., also addresses ADR issues. It studies legal and policy issues affecting confidentiality of information divulged to mediators or other neutrals in the course of settlement negotiations. The resulting recommendation contains a model confidentiality rule for federal agencies. A third study for the Conference, by Marianne K. Smythe, led to a Conference statement on resolution of claims against commodities brokers and similar reparations cases.

Committee research plans for 1989 include studies of the use of medically trained decisionmakers in federal disability programs and potential roles and training for agency contracting officers in implementing ADR methods to avert or resolve procurement disputes.



*Chairman Committee on Administration Darrel J. Grinstead greeting Supreme Court Justice Anthony Kennedy with Conference Chairman Marshall J. Breger and Executive Director William J. Olmstead in the back.*

THE SPECIAL COMMITTEE ON ETHICS IN GOVERNMENT, chaired by Fred F. Fielding, focused its attention in 1988 on conflict-of-interest issues related to the presidential transition period and the staffing of a new administration. The Committee recommended a code of ethical conduct for presidential transition workers designed to prevent misuse of

inside information both during and after the transition. The recommendation, approved by the Conference, served as the basis for Transition Standards of Conduct adopted by President-elect Bush and was incorporated in President Reagan's memorandum to heads of departments and agencies on this subject. The Committee also proposed an amendment to the Internal Revenue Code to permit deferring payment of taxes on gains realized when appointees to high level government positions are required to divest property to satisfy federal conflict-of-interest requirements.

Ongoing committee projects include studies of the Ethics in Government Act's executive branch public financial disclosure requirements, by Professor Thomas D. Morgan of Emory University School of Law and of appropriate conflict-of-interest rules for federal advisory committees by Richard K. Berg, Esq.

THE SPECIAL COMMITTEE ON FINANCIAL SERVICES, chaired by Kenneth J. Bialkin, of Skadden, Arps, Slate, Meagher & Flom, had a highly productive year, beginning with a review of the adjudication practices and procedures of the federal bank regulatory agencies, conducted by Professor Michael P. Malloy of Fordham University Law School. The Special Committee also studied the Federal Reserve Board's handling of applications for the formation or acquisition of banks or nonbanking interests under the Bank Holding Company Act, for which a report was prepared by Professor Alfred C. Aman, Jr., of Cornell University Law School. Professor Aman's report became the basis for ACUS Recommendation 88-3.

The Special Committee concluded the year with a review of the procedures governing the administrative adjudication of claims against savings institution receiverships, based on a study by Professor Lawrence G. Baxter, of Duke University Law School. Professor Baxter's report was cited by the Supreme Court in *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corporation*, 109 S. Ct. 1361, and became the basis for ACUS Recommendation 88-8. The report received widespread attention on Capitol Hill and in the banking regulatory agencies.

In 1988 the COMMITTEE ON GOVERNMENTAL PROCESSES, chaired by Harris Weinstein, worked on two projects that led to recommendations the Administrative Conference adopted. Recommendation 88-2, adopted at the June plenary session, deals with indemnification of government contractors. Professor Frank Grad of the Columbia University School of

Law was the consultant on this recommendation. Recommendation 88-10, based on a study conducted by Professor Henry H. Perritt, Jr., of the Villanova University School of Law and adopted in December, addresses federal agencies' use of computers for the acquisition and release of information. Professor Susan Hadden of the Lyndon B. Johnson School of Public Affairs of the University of Texas prepared a supplementary report focusing on the Community Right-to-Know Act.

The Committee also examined procedures by which agencies decide whether to indemnify government contractors against liability claims by third parties. Such claims may arise when a third party is injured or damaged by a product or service supplied by the contractor. Several agencies have statutory authority to include indemnification provisions in their contracts.

Recommendation 88-2 identifies factors agencies should consider when determining whether to indemnify a contractor against claims. The recommendation suggests interagency cooperation where an agency has insufficient technical expertise to assess the degree of risk in deciding whether to indemnify. It also calls for compilation of information on existing indemnity clauses and any claims under them.

A third area for the Committee involved the impact of evolving information technology on agencies' programs. At the December plenary session, the Conference adopted a recommendation (88-10) offering guidance to agencies that are considering whether to use computers to acquire or release information. The recommendation states general principles to assist agencies in fulfilling their obligations under the Freedom of Information Act when information is maintained in electronic form. The Conference also urged agencies to experiment with electronic means of providing public participation in administrative proceedings.

In addition to the Committee's consideration of the Grad and Perritt reports, the Committee met with Professor Michael Baram for an initial presentation on disclosure of risk information as a regulatory technique. That study was transferred to the Committee on Regulation.

THE COMMITTEE ON JUDICIAL REVIEW, chaired by Thomas M. Susman, considers statutory and case law concerning judicial review of administrative action, as well as those aspects of administrative procedure that affect the availability or effectiveness of judicial review. Professor Thomas Sargentich of American University studied judicial review of preliminary challenges to agency action. Recommendation 88-6, which recommends that these challenges be heard by a court that would have jurisdiction over final agency action and urges courts of appeals to ensure that their procedures allow for prompt disposition of claims alleging unlawful delay by agencies, grew out of this study.

Two other projects the Committee actively considered in 1988 were a comprehensive study of nonacquiescence by federal agencies in

the adverse decisions of reviewing courts, undertaken by Professors Samuel Estreicher and Richard L. Revesz of New York University School of Law, and a study by Robert A. Anthony, Professor of Law at George Mason University, of judicial deference to agency statutory interpretations expressed in various formats. The Committee proposed a recommendation on nonacquiescence that suggested limits on permissible nonacquiescence and recommended various procedural safeguards. The topic proved controversial and divisive at the special plenary session in September, however, and the recommendation was referred to the Committee for further consideration. Work on proposed recommendations based on Professor Anthony's study is continuing.



*Walter Gellhorn makes a point to Samuel Estreicher, Professor at New York University School of Law and Thomas M. Susman member of the law firm of Ropes & Gray and Chairman of the Judicial Review Committee.*

THE COMMITTEE ON REGULATION, chaired by Betty Jo Christian, spent most of the year on a very thorny problem of regulation: how agencies put a value on human life in the course of regulatory activities. The background report by Professors Thomas Hopkins and Clayton Gillette provided details on the inconsistent practices agencies follow in this regard and provided the basis for the Committee-sponsored Recommendation 88-7, "Valuation of Human Life in Regulatory Decisionmaking."

Committee topics for 1989 include risk communication as a regulatory technique and the regulation of biotechnology.

THE COMMITTEE ON RULEMAKING, chaired by Ernest Gellhorn, considers whether the procedures federal agencies use to promulgate rules and regulations are adequate and clearly delineated. In 1988 the Committee completed its consideration of presidential review of agency rulemaking, relying on a report on the subject by Professor Harold H. Bruff of the University of Texas School of Law. The Committee concluded that presidential review of agency rules should be continued, subject to certain exclusions and procedural guidelines. The Conference adopted this proposal, Recommendation 88-9, at its December plenary session.

Ongoing committee projects include (i) updating the 1983 GUIDE TO FEDERAL AGENCY RULEMAKING, by Professor Benjamin Mintz, Catholic University School of Law, and (ii) a study of agency practices in indexing and making available adjudicatory decisions with precedential effect, by Professor Margaret Gilhooley, Seton Hall University School of Law.

THE SPECIAL COMMITTEE ON THE U.S.-CANADA FREE TRADE AGREEMENT, chaired by Professor Victor G. Rosenblum, developed a seminar on issues in dispute handling under the Free Trade Agreement. The seminar focused on the committee's activities: review of agency antidumping/countervailing duty decisions, trade disputes between the two countries, and the establishment of administrative dispute handling institutions. Panelists included government representatives, members of the bar, academicians, and other international trade and ADR experts. Participants discussed the applicability of mediation, appropriate roles of the panels in interpreting and creating precedent, operation of the panels, and lessons of the GATT and other international dispute settlement experiences relevant to developing procedures under the Free Trade Agreement.

## APPENDIX E - RECOMMENDATIONS AND STATEMENT

### ***Recommendation 88-1*** ***Presidential Transition Workers' Code of Ethical*** ***Conduct (Adopted June 9, 1988)***

The orderly and peaceful transfer of governmental authority following presidential elections is a hallmark of American government. The Presidential Transition Act of 1963 recognizes that a smooth transition is necessary to "assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign," and it directs all officers of the government to take steps to promote the orderly transition of power between the outgoing and incoming administrations.

Since 1933, when Inauguration Day was moved forward from March 4 to January 20, the length of presidential transitions has been between 71 and 79 days. However, the size and complexity of the transition task has grown steadily over time, corresponding to the tremendous growth in federal responsibilities. Each new President-elect has required a larger and more sophisticated transition organization than his predecessor.

The President-elect's transition organization must, in this brief period, prepare to provide the new leadership with comprehensive information on the organization and responsibilities of each federal agency; on the resources within each agency, including the budget, legislative initiatives, personnel and grants or contracts; and on the policy questions that will require decision by the new administration. This information is the basis for the President-elect's personnel, budgetary and policy decisions during the critical initial period of the new administration.

A large number of private citizens must be relied upon to accomplish these important tasks. During the 1980-81 presidential

transition, over 600 persons, most serving as volunteers, had active assignments on agency transition teams. Many of these persons were selected because of their substantive knowledge of the agency's mission, acquired either through past service in the government or in private sector jobs that brought them in contact with the agency. The magnitude and importance of the transition tasks, and the limited time available to complete them, suggest that future Presidents-elect will continue to rely upon large numbers of private citizens, some of whom later will be offered government appointments but many of whom will return to their private sector jobs.

The Administrative Conference wishes to encourage the participation of well qualified individuals in presidential transitions, but it recognizes that the presence of large numbers of private transition workers dealing with federal agencies offers the potential for conflicts of interest or abuse of the public trust that accompanies their special access to government information and facilities. The Conference is not acting upon knowledge of serious problems in this regard in recent transitions, but rather upon the need to prevent such problems from occurring in the future.

In this recommendation the Conference urges the President to issue an executive order to the heads of all federal agencies (including independent regulatory agencies), conditioning special access to federal agency records and facilities by members of the President-elect's transition team upon their agreement in writing to the standards of conduct set forth in the Appendix to this recommendation. The recommended executive order would cover the activities only of "special transition team members," *i.e.*, transition workers, who are not existing government employees, who serve with or without compensation, and who are authorized by the President-elect's transition organization to seek or obtain access to non-public government information. The Conference believes that private citizens are not, and should not be considered, special government employees and thereby subject to federal conflict-of-interest laws, solely because of their activities as special transition team members.

Two concerns are addressed by this recommendation. First, federal agency officials need to know who actually represents the President-elect before granting special access to information. Second, the public needs assurance that authorized transition workers will not use such information to further their own financial interests or the interests of their present or future employers or other private persons.

The Conference believes that the recommended executive order and transition standards of conduct will alleviate these concerns without reducing the flexibility of the President-elect's transition effort. By urging the President to direct federal agencies affirmatively to cooperate with

authorized transition personnel to the extent permitted by law and consistent with their official duties, the recommendation should facilitate the President-elect's transition efforts.

The Conference's recommendation includes requirements contained in pending legislation to amend the Presidential Transition Act of 1963 for minimal disclosure of personal or financial information by transition team workers. The Conference believes that transition team members should supply this limited information to agencies, whether or not the pending legislation is enacted. The Conference also recommends that special transition team members agree not to use non-public government information, or to take any action as transition team members which could further their own financial interests.

## **RECOMMENDATION**

1. The Conference recommends that the President issue an executive order that conditions access by special transition team members to government facilities or non-public information upon their agreement in writing to the standards of conduct set forth in the Appendix to this recommendation. The term "special transition team member" is used herein to mean a person who is not a government employee, who serves with or without compensation as a member of a transition team, and who is authorized by the President-elect to seek or obtain access to non-public government information or facilities.

2. The executive order should direct the heads of all federal agencies to require the President-elect's transition organization to provide each agency with a list of the special transition team members for that agency, copies of their written agreements to comply with the standards of conduct and copies of information disclosure statements, as a condition of access by such members. The agencies should be required to maintain and make those documents available to the public upon request.

3. The executive order should direct all agency heads, subject to the above conditions, to cooperate with persons named by the President-elect or his designees as special transition team members to the extent permitted by law and consistent with the performance of official duties.

4. The executive order should direct all agency heads to take appropriate action against any person found to have violated the standards of conduct agreement, including, where authorized and in accordance with applicable procedures, barring the person from employment, receipt of contracts, representation of others before the agency, or referral of the matter to appropriate professional disciplinary bodies.

## APPENDIX

### Transition Code of Ethical Conduct

Each person who is not an employee or special government employee of the federal government and who assists in the presidential transition, with or without compensation, and who is designated by the President-elect to seek or obtain access to non-public government information or facilities during the transition period (herein referred to as a "special transition team member"), shall agree to comply with the following standards of conduct as a condition of such access.

1. **Disclosure of Information.** A special transition team member shall supply the agency with a statement as to his or her present employment and the sources of funding which support his or her transition activities.

2. **Misuse of Inside Information.** A special transition team member shall not use, permit others to use, or disclose non-public information except for the public purposes of the transition.

3. **Financial Self-Dealing.** During the transition period, a special transition team member shall not knowingly take any action on a particular matter involving the federal agency which could have a direct effect upon a financial interest of the transition team member, his or her spouse, a family member, or any individual with whom the transition team member has a business, professional or close personal relationship.

4. **Concurrent Representation in Agency Proceedings.** During the transition period, a special transition team member shall not advise or represent, with or without compensation, anyone in any particular matter involving a federal agency to which he or she has had access to non-public information. This restriction does not extend to the special transition team member's firm or organization, but the team member should advise his or her firm or organization to establish procedures to assure that the team member does not participate in any way in any such agency proceeding.

5. **Misuse of Government Property.** A special transition team member shall conserve and protect federal property entrusted to him or her, and shall not use federal property, including equipment and supplies, other than for purposes directly related to transition activities.

6. **Post-Transition Activities.** For two years after the transition, a former special transition team member shall not represent, with or without compensation, any person before an agency in any

particular matter involving a specific party or parties as to which he or she obtained government information not then available to the public and not made public prior to the request for advice or representation.

7. **Definitions.** As used in this Appendix [Order], the terms "employee," "special government employee," "particular matter" and "particular matter involving a specific party or parties" shall have the same meaning as in Title 18, United States Code, 202-209. The term "transition period" shall extend from the date of the general election in which the identity of the President-elect is established until Inauguration Day, or if the transition organization continues to operate after the inauguration, such later date through which the special transition team member continues to serve in that capacity.



*Attorney General Richard L. Thornburgh making a presentation to Conference members.*

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1. 78 Stat. 153, 2; 3 U.S.C. 102 note.

2. H.R. 3932, passed by the House of Representatives on March 31, 1988, and S. 2037, passed by the Senate on April 26, 1988, would require disclosure of the names of transition team workers, their most recent employment and the source of funding of their transition activities as a condition of receipt of public funds for transition activities.

3. It is noted that the term "particular matter" has been interpreted to include rulemaking and general policy matters, and extends to all discrete matters that are the subject of agency action, no matter how general the effect.

***Recommendation 88-2:***  
***Federal Government Indemnification of***  
***Government Contractors*** (Adopted June 9, 1988)

Indemnification of government contractors for third-party liability involves this issue: who should bear the risk of liability for injury or damage to a third party caused by products and services supplied by government contractors? This issue is especially significant when the products and services involve high-risk or hazardous governmental activities.

The liability of the government is limited by the doctrine of sovereign immunity, which has been waived only in certain situations, such as the Federal Tort Claims Act. Some courts have recognized a common law immunity for government contractors who have complied with pertinent government specifications and have disclosed all known defects or hazards to the government.\* In the absence of insurance or indemnity, government contractors may be exposed to claims based, for example, on alleged failure to follow specifications or adequately warn the government or others about product design defects.

No government-wide legislation provides generally for indemnification of government contractors for third-party liability, although a number of individual departments and agencies are authorized to indemnify contractors.<sup>1</sup> All of the laws authorizing government indemnification of contractors state conditions that must be met before contractual indemnity will be granted, and designate the official who is to determine whether the conditions have been met. Thus some statutes restrict indemnification to unusually hazardous governmental activities or activities that may result in catastrophic losses and further require the contractor to obtain such insurance as is available. Indemnification clauses included in contracts usually contain further conditions, some of which are required by agency rule. A common restriction is that the indemnity does not cover claims resulting from the contractor's willful misconduct.

Indemnification clauses are reserved for unusual circumstances, and few contractors are actually provided with indemnity. The Department of Defense, for example, included indemnification clauses in an average of about 70 contracts per year in the 5-year period 1980-84; by way of comparison, during fiscal year 1984 alone, the Department entered into over 14.8 million contract actions.

The Conference's study of contractual indemnification found virtually no evidence of claims made on the basis of indemnification clauses or litigation over such claims. Although there is no indication that the government has incurred significant costs under contractual indemnity provisions in the 30 years that have passed since enactment of the

National Defense Contracts Act in 1958 and the Price-Anderson Act in 1957, the space shuttle disaster and the Three Mile Island nuclear incident suggest that contingent liabilities under indemnity agreements are potentially costly.<sup>2</sup>

The Conference's study found that agencies generally do not believe that current practices and limits on indemnities discourage potential contractors from bidding. Federal agencies, with few exceptions, see little need for greater indemnification authority or for broad legislation that would extend indemnities to government contractors generally. However, this view is not shared by many federal contractors. They take the position that the decreasing availability of private insurance for a broad range of hazardous activities is greatly reducing the pool of bidders for contracts involving those activities in the absence of government indemnification. This legislative debate is beyond the scope of the present recommendation.

While the Conference takes no position on the current debate over proposals to expand agency authority to indemnify contractors for hazardous activities, mass injuries, or other special circumstances, the Conference does recommend the compilation of certain information that would provide a better basis in the future for ascertaining the need for and risks associated with broader indemnification.

This recommendation identifies several factors that agencies should consider when they determine whether to grant an indemnity clause to a particular contractor. It is appropriate for agencies to consider the scope of the indemnity proposed to be granted, including the proper mix of self-insurance, private insurance, and government indemnity. The factors listed should also be considered by Congress in deciding whether to grant new authority to an agency to indemnify its contractors.

Decisions to indemnify ordinarily require an assessment of whether the activity in question involves an unacceptable hazard or degree of risk. Sometimes the degree of risk is defined in terms of availability of insurance. Agencies regularly engaged in high-risk activities and able to grant indemnity clauses, such as the Department of Energy, Nuclear Regulatory Commission, or National Aeronautics and Space Administration, would normally have the resources to perform risk assessments. However, other agencies that confront these issues less frequently may not have adequate technical expertise to decide. It has been asserted that there is often great uncertainty, and such decisions may be made inconsistently. The recommendation suggests referral and interagency cooperation as a way of meeting this problem.

## RECOMMENDATION

1. **Identification of Agency Authority to Indemnify.** Each agency that has, and intends to exercise, the authority to indemnify any of its contractors against liability to third parties should set forth, in a

policy statement or regulation, the agency's understanding of the extent and source of its authority to indemnify contractors. The agency should consult with the Department of Justice and the Office of Federal Procurement Policy in drafting the statement or regulation.

**2. Agency Decision Whether to Grant an Indemnity Clause.** Before deciding to grant an indemnity clause to a contractor, an agency should identify the public benefits expected to be gained by such a grant and should take into account:

(a) the nature and magnitude of the risks involved in the covered activities, including the danger inherent in the work to be performed, the adequacy of the state of the art to assess the inherent danger, the aggregate liability that could be incurred, when the liabilities might be incurred, and how current insurance policies would apply to such liabilities;

(b) the scope of the indemnity proposed to be granted;

(c) the source of funds that would be used to pay an award under the indemnity clause, including the possible application of the Federal Anti-Deficiency Act, and the impact, if any, that such an award will have on the programs of the agency or other units of the government;

(d) the incentives that either providing or denying an indemnification clause would give the agency for supervising contractual performance, so as to provide for maximum protection of the public from injury and to protect the government from unwarranted liability in light of the identifiable risks;

(e) the incentives that the contractor would have, assuming indemnification were granted, for performing under the contract in a safe and prudent manner;

(f) the incentives that the contractor would have, assuming indemnification were granted, to defend itself or to help defend the government in any subsequent litigation; and

(g) any effects, assuming indemnification were granted, on the ability or the willingness of the insurance industry to make available private insurance for the kinds of activities to which the indemnification would apply.

**3. The Need for More Information.** Each agency that has paid out any sum of money or received any claims for payment under a contractual obligation to indemnify a contractor, or on whose behalf such sums have been paid by the federal government, should report all such payments and claims to the Office of Federal Procurement Policy (OFPP) on an annual basis. The OFPP should periodically issue a report summarizing the information received. All such reports should be made available to the public except to the extent that release of any information

included is prohibited by law. The OFPP should also obtain from each affected agency a list, updated periodically, of all existing contracts containing indemnity clauses.

4. **Contracting Office Expertise.** Where an agency is considering whether to grant an indemnity clause, but the contracting office does not have sufficient technical expertise to assess the degree of risk, the extent of the hazard, or the availability of insurance, these questions should be referred to an office of the agency that does have the requisite expertise to assist the contracting office in making such decisions. If the contracting agency as a whole lacks the expertise required to assess these matters adequately (for example, where unusual or newly emerging technological risks are involved), the agency should seek the assistance and cooperation of other agencies. Agencies with pertinent experience or knowledge should cooperate to make available to requesting agencies staff members whose experience in risk assessment may be helpful. It may be appropriate to create a small, highly-qualified risk assessment office to furnish or coordinate such assistance.

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\* Subsequent to adoption of the recommendation, in a case involving military equipment, the Supreme Court accepted this view. See *Boyle v. United Technologies*, 108 S. Ct. 2510 (1988).

1. Examples are the National Defense Contracts Act, 50 U.S.C. 1431, as implemented by Executive Order 10789 (providing for indemnification under national defense contracts for unusually hazardous or nuclear risks); section 2354 of title 10 of the United States Code (providing for indemnification for unusually hazardous defense research and development activities); section 170 of the Atomic Energy Act, as amended by the Price-Anderson Act of 1957, 42 U.S.C. 2210(d) (providing indemnification for activities involving the risk of a substantial nuclear incident); the Federal Aviation Act, as amended, 49 U.S.C. 1531 et seq. (providing for indemnification for risks where aircraft operations are necessary to carry out U.S. foreign policy); and the National Aeronautics and Space Act, as amended, 42 U.S.C. 2458b (providing for indemnification for damages related to the launch, operation or recovery of space vehicles).

2. In 1982, the Comptroller General issued an opinion (B-201072, May 3, 1982; reconsidered 62 Comp. Gen. 361 (1983)) stating that to comply with the Federal Anti-Deficiency Act, 31 U.S.C. 1341, indemnity clauses in government contracts must specify that the indemnity is available only to the extent of available authorized appropriations. This limitation, however, has limited impact where Congress has set maximum indemnity limits by statute, as in the Price-Anderson Act, or where no ceiling is set, as in the National Defense Contracts Act. The Price-Anderson Act reauthorization is pending as of the date of this recommendation.

**Recommendation 88-3:**  
**The Federal Reserve Board's Handling of**  
**Applications Under the Bank Holding**  
**Company Act** (Adopted June 9, 1988)

Among the Federal Reserve Board's (FED's) responsibilities is implementation of the Bank Holding Company Act (BHCA) (12 U.S.C. 1841 *et seq.*). The BHCA's principal purposes are to ensure the safe and sound operation of bank holding companies (BHCs), to promote competition within the banking industry, and to separate banking from commerce.

Under the BHCA, the FED has also been authorized to determine the extent to which BHCs may engage in "non-banking" activities in the parent BHC and in non-bank subsidiaries. Because the banking industry has undergone rapid changes in the face of new technologies, the line between banking and other financial activities has been blurred.

Under Section 3 of the BHCA, the FED receives applications for the formation of or acquisition of banks by BHCs. The statutory factors which the Board must apply in acting on Section 3 applications include an evaluation of the competitive impact of the transaction, the convenience and needs of the community to be served, and the financial and managerial resources of the applicant.

Under Section 4(c)(8) of the Act, the FED receives applications by BHCs to acquire non-banking interests. Such applications are to be approved only when the activities involved are "closely related" to and a "proper incident" to banking. These questions have become of particular significance most recently in applications involving proposed securities and insurance activities of BHCs.

Applications under both sections are generally resolved without the need for an evidentiary hearing, although informal hearings and meetings are sometimes held. Both sections do, however, provide for an overall 91-day time limit on the FED's action on individual applications "beginning on the date of submission to the Board of the complete record on the application." The FED routinely processes well over 90 percent of the applications received by the FED within 60 days of "acceptance" of the application by the Reserve Bank (the Bank is permitted to request information, but otherwise must adhere to a short deadline in accepting the application and forwarding it to the FED). The FED's regulations specifically provide that, in every case in which an application has not been considered by the FED within 60 days of acceptance, the applicant will be notified and provided a written explanation for the delay.

In its regulations, the FED defines when the record on a particular application is complete for purposes of determining when the statutory 91-day period has begun. Under the FED's regulations, the 91-day

period begins on the the latest of four dates: 1) the date of acceptance of the application; 2) the last day of the public comment period (which is usually after acceptance of the application, and is the date upon which the 91-day period begins in the majority of cases); 3) the date of receipt of any relevant material information regarding the application; and 4) the date of completion of any hearing or other proceeding regarding the application.

Because the statute provides that the 91-day period does not begin until the complete record has been submitted to the FED, the courts have determined that the 91-day period may be tolled or retriggered after the close of the public comment period if new material information is submitted during the processing of the application. Examples of this type of information include comments or protests from interested parties, changes in the financial condition of the applicant, proposed efforts by the applicant to raise additional capital, or proposed divestiture plans to accommodate competitive problems.

Because there is always the possibility that submission of additional material information may toll or retrigger the 91-day period, the 91-day period is rendered rather uncertain in practice. Therefore, the Conference suggests that the FED's regulations on this issue ensure that there is a point in the application process at which the FED will declare that the applicant's file is deemed to be informationally complete, thus triggering the 91-day rule, unless additional information of a highly significant nature relating to the application is received.

The nature of the regulatory process established under the BHCA encourages a participatory approach to decisionmaking on the part of applicants and the FED. Various kinds of conditional order are used by the FED to tailor its regulatory decisions to the specific applicant before it. These regulatory conditions appear or are referenced in the FED's final order, and such conditions are subject to judicial review. Other decisions, however, reflect voluntary commitments made by the applicant. Such commitments often are the result of a decision by the applicant to expedite processing of a particular application by committing to resolve questions that might otherwise result in denial of the application. These commitments usually do not appear in the FED's order and, while reviewed by the Board in every case, are not subject to judicial review at the instance of the applicant.

The Conference believes that conditions and commitments are important regulatory tools used by the FED that, for the most part, add flexibility to and encourage efficiency in the consideration of applications to individual cases, providing a wide range of regulatory choices between unconditional approval and complete denial of an application.

## RECOMMENDATION

The Board of Governors of the Federal Reserve System should take the following actions with respect to the FED's handling of applications under the Bank Holding Company Act.

**1. Clarification of the 91-day rule.** When acting on such applications, the Federal Reserve Board should by regulation provide that only receipt of information of a highly significant nature pertaining to the application will be deemed to warrant reopening an applicant's file, thereby deferring the date by which the Fed must act finally on the application.

**2. Conditions and Voluntary Commitments.** Conditions established by the FED regarding applications and voluntary commitments offered by applicants should be unambiguous and reasonably related to an articulated policy of the Federal Reserve Board. Voluntary commitments, when offered by applicants, should, consistent with the Freedom of Information Act, ordinarily be made part of final orders of the Board. Moreover, the Board should, from time to time, summarize the thrust of these commitments and publish and disseminate these summaries.



*Warren Belmar, member of Committee on Financial Services and Kenneth J. Bialkin, Financial Services Committee Chairman at plenary session.*

***Recommendation 88-4:  
Deferred Taxation for Conflict-of-  
Interest Divestitures (Adopted June 9, 1988)***

Individuals appointed to government positions are sometimes required to divest themselves of property to satisfy conflict-of-interest requirements, such as the prohibition in 18 U.S.C. 208 on participation in matters affecting one's financial interest. In other instances, divestiture of property by such appointees would be simpler and serve conflict-of-interest purposes better than the establishment of qualified blind trusts or subsequent and sometimes frequent recusals by an official from participation in particular decisions. In addition, persons serving in the government occasionally are required to divest themselves of property before accepting a new position or as a condition to participating in a particular matter.

Divestiture of property to avoid conflicts of interest will often result, under current law, in financial losses in the form of taxation of the gains realized as a result of divestiture. The Administrative Conference believes that this tax burden is a disincentive to individuals who would otherwise accept a federal appointment, and in the case of present officials, an unnecessary burden resulting from their performance of official responsibilities. The adverse effects of this disincentive to government service are most acute with respect to the most senior positions involving major policymaking roles. Failure to obtain the best people for those positions, or the frequent recusals of people in those positions, may have serious adverse consequences on both the individuals involved and the government.

The Conference accordingly recommends that Congress amend the Internal Revenue Code to permit deferred taxation of gains for presidential appointees subject to Senate confirmation and other individuals entering the government to accept high level executive branch positions, whenever they are requested or ordered by an appropriate authority to divest themselves of property to avoid actual or potential conflicts of interests. The Conference also recommends that Congress consider amending the Code to extend similar tax treatment to persons serving in the executive branch.

The Conference proposes that this defined class of persons be permitted to sell such property and to place the proceeds in a neutral investment vehicle and maintain their original basis in the divested property. Taxation would not be eliminated by this proposal, but only postponed until the individual ultimately disposes of the proceeds of a reinvestment vehicle. The Conference also suggests specific factors and other matters to be taken into account in amending the Code to accomplish these purposes.

The Conference believes that revenue impact of the recommendation will be minimal considering the narrow class of persons that would be eligible for tax deferral.

## RECOMMENDATION

1. Congress should amend the Internal Revenue Code to permit presidential appointees who are subject to Senate confirmation and other officials entering the government to accept high level executive branch appointments, to divest property, such as securities, and reinvest the proceeds in a neutral investment vehicle and thereby defer realization of taxable gains.

2. Such amendment should take into account the following factors:

(a) the need to assure that the divestiture is undertaken to avoid actual or potential conflicts of interests, by conditioning the deferral on an order or request of the President (or his delegate such as the White House Counsel or the Director of the Office of Government Ethics);

(b) the need for divestiture by spouses, dependent children, and others whose assets may be imputed to the federal official for conflict-of-interest purposes, by making deferral available to them also; and

(c) the need to assure that the reinvestment vehicle avoids conflicts of interests with respect to the position to be held, by having the person ordering or requesting divestiture approve the vehicle.

3. Congress should consider whether the amendment should contain provisions dealing with the following matters:

(a) a minimum period of required government service after divestiture to qualify for deferral;

(b) requiring the appointee to defer gains or losses for all property within the class of divested property (*e.g.*, all energy stock), in order to prohibit the appointee from recognizing losses and deferring gains;

(c) permitting the appointee a second deferral on leaving government service (or within a brief period of time thereafter) if the appointee chooses to dispose of the neutral investment held during government service in order to make another investment.

4. The Conference recognizes that other persons serving in the executive branch may be ordered or requested to divest specific property in order for them to perform their duties free of actual or potential

conflicts of interest, and believes that Congress should also consider, at the appropriate time, whether to extend similar tax treatment to them.

This recommendation is limited to executive branch appointees and employees because the Conference by statute is limited to studying and recommending improvements to administrative procedure, 5 U.S.C. 571-576. The Conference, therefore, takes no position on whether or not similar tax treatment should be accorded to officers of the judicial branch.

### ***Recommendation 88-5:***

#### ***Agency Use of Settlement Judges (Adopted June 10, 1988)***

Many cases over which administrative law judges, administrative judges, and other agency hearing officers preside do not involve broad regulatory issues and are often appropriately resolved by settlement. Following in the footsteps of several innovative federal judges, some administrative agencies have begun to provide additional mechanisms for resolving these cases. The Federal Energy Regulatory Commission and the Occupational Safety and Health Review Commission have used a "settlement judge"--not the presiding judge in the case--to work with parties to explore possibilities for consensual resolution. Other alternatives that agencies have used include prehearing conferences and summary procedures, and more recently, minitrials, mediation and binding and nonbinding arbitration.

Agency prehearing conferences have historically been utilized as a means for either settling an entire case or narrowing the issues. Today, some presiding judges are exceptionally effective at using these conferences to promote settlement without overstepping bounds of propriety. Still, while the presiding judge may be the ideal person to suggest that the parties talk settlement in a reasonable manner, he or she often cannot help the parties' explorations in any comprehensive way without risking the appearance of impropriety. In broad classes of cases, a separate settlement judge, not so limited, can exercise greater settlement-inducing authority than the presiding judge.

The Conference does not intend to suggest that use of settlement judges is a dispute resolution method that is necessarily better or worse than adjudication, arbitration, minitrials, mediation by staff personnel or nongovernment mediators, or settlement by the presiding judge; parties should retain maximum flexibility to use the best procedure for their case. The best solution of all is to settle *before* an action has been instituted, and agencies should also do far more to instill consensual methods of dispute resolution into investigatory, pre-enforcement, and

other stages. The settlement judge technique, nonetheless, is a useful means of facilitating settlements that, in appropriate adjudications, may be of great value.

The settlement judge can command a degree of deference similar to that of the presiding judge without the need to observe all of the commands that establish and maintain impartiality. A separate settlement judge, once appointed, can engage in *ex parte* and off-the-record conversations, frank assessments of the merits, and other techniques to aid settlement that the presiding judge is less free to use. The settlement judge is generally knowledgeable about the kind of case and the parties' interests, and is in a position to lend structure to the negotiations, control their pace, reduce the adversarial nature of the process, and help the parties to assess objectively both the strengths and weaknesses of the case and to find reasoned solutions. The settlement judge is familiar with how the presiding judge is likely to handle such cases, how much time and effort they take, how evidence is weighed, and what kind of a reception the legal and factual issues will be given in light of agency precedent and policy. The settlement judge, who carries a judge's power and authority, may greatly reduce the scope of parties' disagreements over likely outcomes. Parties also are less likely to be skeptical about the informal settlement judge process and more likely to view this device as a legitimate and potentially valuable means of reaching an enforceable, legally defensible settlement.

Several other advantages may accrue. Initiating the settlement judge technique may be an excellent way for agencies to introduce the idea of settlement in proceedings in which it is not now frequently pursued but which the presence of other factors seems to make apt candidates. In such circumstances, an agency could make special efforts to make the technique available in the interest of breaking the adversarial mold, perhaps preceded by seminars or other devices to permit its presiding judges to study mediation, negotiation and other settlement-inducing techniques. In individual cases, use of a settlement judge might lead the parties to turn to mediation or other non-adjudicatory means of pursuing a settlement agreement. Presiding judges' experiences as settlement judges, and possible enhanced expertise as mediators, should help them in resolving later cases.

Settlement judges are not a panacea, and their use must take into account caseloads, possible abuses in extreme cases, and likelihood of success. The very potency of the judicial office means that it must be carefully employed to avoid abuse. Even so, the Conference sees great merit in the settlement judge technique and urges that it receive much wider consideration and application as a means of actually settling matters, or convincing the parties to undertake other consensual dispute resolution methods.

These recommendations suggest procedures for using the settlement judge as a final effort to obviate formal proceedings, as well

as guidelines that seek to increase potential gains in efficiency while minimizing possible abuses that may result from a greater reliance on settlement in agencies' adjudicatory proceedings.

## RECOMMENDATION

### **A. Encouraging Use of Settlement Judges**

1. As part of efforts to encourage use of consensual means of dispute resolution, federal agencies that decide cases presided over by administrative law judges, administrative judges, or other hearing officers should encourage and facilitate settlement of adjudicatory proceedings by the voluntary use of settlement judges and other consensual methods.

2. Agency offices of administrative law judges, boards of contract appeals, and other hearing offices should adopt rules for appropriate use of settlement judges.

3. In urging regularized and amplified utilization of settlement judges, the Administrative Conference has no intention of discouraging reliance on other methods of dispute resolution without recourse to formal procedures. In many instances, cases of the types deemed suitable for reference to a settlement judge (paragraph B, below) can and should be settled at preliminary stages of disagreement. At times, moreover, early recourse to mediation or arbitration (where authorized) may be appropriate. The Administrative Conference urges constant attention to settlement possibilities long before a controversy has reached the docket of a trial judge.

**B. Appropriate Cases.** In general, the agency use of settlement judges may be appropriate where one, and particularly more than one, of the following factors appear:

1. Crowded dockets with relatively few cases being settled.

2. Presence of a large proportion of factual issues that are not of major precedential importance and do not raise broad policy or legal issues, particularly where the facts are undisputed and the primary issues concern the interpretation or characterization of such facts.

3. Remedies susceptible to gradation and, thus, to compromise. Examples are money claims, rates, and degrees of restrictions or activity.

### **C. Administrative Issues**

1. The chief judge should retain discretion in assigning settlement judges on the basis of the situations, issues, judges' aptitudes and personalities, and so forth. He should also remain free to refuse to appoint a settlement judge.

2. The agency head should ordinarily not suggest use of a settlement judge, since he is much less likely to know when a particular case is suitable for settlement and much more likely to desire a case to be settled to avoid having to decide it.

3. Given the workload of presiding judges and possible limited availability for appointment as a settlement judge, agencies should use, as an alternative source of settlement judges, currently retired ALJs who have notified the Office of Personnel Management that they would accept temporary appointment (pursuant to 5 U.S.C. 3323(b), enacted in 1984), retired administrative judges or hearing officers, or active hearing officers from another agency.

4. Agency presiding judges, and especially chief judges, should regularly review their dockets to identify cases where use of settlement judges may be useful, and consult regularly with experienced mediators to locate cases ripe for settlement.

5. Agencies should give attention to offering training in negotiation, mediation, and other consensual dispute resolution skills to administrative law judges, administrative judges, and other hearing officers. Training courses or seminars should be developed by agencies jointly or in cooperation with the Administrative Conference, Federal Mediation and Conciliation Service, Board of Contract Appeals Judges Association, American Bar Association, or other professional organizations. Agencies should also work with other interested groups to sponsor similar programs or outreach sessions for representatives who regularly appear in agency proceedings.

**D. Procedures.** Agency regulations or guidelines implementing the use of settlement judges should consider the following:

1. Suggesting use of a settlement judge

(a) The suggestion that a settlement judge be consulted may be made to the agency's chief judge by any party or by the presiding judge (although the agency head's invocation of the technique should be restrained (see C.2, above)). Because it will usually be difficult to predict at what points in the prehearing process settlement will be possible, the presiding judge and the parties should be free to request appointment of a settlement judge at any time. Any party or the presiding judge may veto such a suggestion.

(b) The chief judge should seek to ensure that all parties who appear *pro se* consent knowingly and voluntarily before he decides to invoke the aid of a settlement judge.

2. Appointment

(a) When appointing a settlement judge, the chief judge should issue an order specifying the length of time for such negotiations and confining the scope of any settlement negotiations to specified issues.

(b) When a settlement judge is appointed, the presiding judge may suspend discovery or other proceedings during the time the matter is assigned to the settlement judge.

(c) If settlement negotiations are terminated, the chief judge may subsequently appoint a settlement judge in the same proceeding to conduct further negotiations.

(d) To ensure that proceedings are not unnecessarily interrupted, agency regulations or guidelines should provide that any decision concerning the appointment of a settlement judge or termination of settlement negotiations is not subject to review or rehearing.

### 3. Conduct of negotiations

(a) The regulations should afford the settlement judge broad authority to:

(1) confer with the parties on the subject of whole or partial settlement,

(2) suggest privately to a party's representative what concessions be considered by the party,

(3) assess privately with each representative the reasonableness of the party's case or settlement position,

(4) facilitate communications between the parties,

(5) mediate,

(6) seek resolution of as many issues in the case as is feasible, and

(7) recommend use of minitrials, mediation, factfinding, or other consensual resolution means, and, if the parties genuinely wish some method of presenting evidence in a settlement context or having the dispute mediated, the settlement judge should be free to refer them to a separate minitrial or mediation process.

(b) To increase the likelihood of settlement, the regulations should:

(1) provide that the settlement judge may recommend that the representative who is expected to try the case be present at a settlement conference and that the parties, or their agents having full settlement authority, be present.

(2) set forth specific guidelines for conducting settlement conferences (including by telephone) where appropriate.

(3) exhort all parties and their representatives to be candid with the settlement judge so that he may properly guide settlement discussions.

(4) provide the settlement judge with flexibility to impose any additional requirements proper to expedite resolution of the case.

(c) The settlement judge should, within days after appointment, meet or talk with the parties together and (usually) separately to determine what obstructs settlement. Proceedings before a settlement judge should not ordinarily be lengthy or elaborate.

#### 4. Confidentiality

(a) To encourage the candor often necessary to achieve a settlement, the regulations should provide that no evidence of statements or conduct by parties, counsel or settlement judge in the settlement proceedings shall be admissible in any subsequent hearing, except by stipulation of the parties. The regulations should further provide that documents disclosed in a settlement process may not be used in litigation unless obtained by appropriate discovery or subpoena. Agencies should provide sanctions against any violators.

(b) The regulations should prohibit the settlement judge from discussing the merits of the case with the presiding judge or any other person and preclude the settlement judge from being called as a witness in any hearing of the case.

#### 5. Settlement and reports

(a) At the conclusion of the settlement procedures, either the parties should tell the presiding judge that they have settled, or the settlement judge should advise the trial judge, without elaboration, that settlement has not been reached. The report should not attribute any view to any party or assess any positions taken. The agency's regulations should describe the method by which the presiding judge is advised that settlement has not been reached.

(b) To protect against unnecessary delay, the settlement judge's first report should be made within a specified period after appointment. The agency head or chief judge should be authorized to order additional reports at any time.

(c) In reporting, the settlement judge may recommend the termination or continuation of settlement negotiations.

(d) A settlement arrived at with the help of a settlement judge should be treated like any other settlement.

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1. In addition to settlement conferences, courts have engaged in broad and growing use of other means for facilitating an early disposition of a case including arbitration, special masters, mediators, and the use of summary jury trials. Rule 16(c) of the Federal Rules of Civil Procedure was amended in 1983 to provide that settlement and "extrajudicial procedures" for resolving disputes are desirable and may be a subject at pretrial conferences, while subsection (f) of the rule provides for sanctions for failure to appear at, to be prepared for, and "to participate in good faith" at such conferences.

2. See ACUS Recommendation 70-4(1) (urging presiding officers to hold prehearing conferences on own motion or at the request of the parties) and Recommendation 70-3 (summary decision).

3. See ACUS Recommendation 86-3 (alternative means of dispute resolution) and Recommendation 87-11 (alternative means of dispute resolution in government contract disputes). In both recommendations, use of settlement judges is specifically recommended, 86-3(D), 87-11(d). See also Recommendation 72-4(D) (settlement of ratemaking cases).

4. See Recommendation 86-3 and 87-11, *id.*

5. See Recommendation 72-4, *supra*, note 3.

6. This should not prevent judges within the same office from engaging in discussions of settlement or mediation techniques that may aid the settlement judge in resolving particular cases and assist in a judge's professional development.

**Recommendation 88-6:**  
**Judicial Review of Preliminary**  
**Challenges to Agency Action** (Adopted September 16, 1988)

The Administrative Conference of the United States has long had an interest in forum allocation in administrative cases. In Recommendation No. 75-3, "The Choice of Forum for Judicial Review of Administrative Action" (1975), the Conference stated criteria for determining the appropriate judicial forum for the review of final administrative action. The Recommendation urged that agency actions taken on the basis of a formal evidentiary record should normally be directly reviewable by courts of appeals, and that rules and other informal orders issued by agencies whose formal orders are subject to review in the courts of appeals should be reviewable by those same courts.

Building upon the principles underlying that recommendation, the Conference now addresses the proper forum for judicial review where an agency has issued no final order, but agency action (or inaction) is nevertheless considered reviewable by a court\*. For example, a party may allege that agency action has been "unlawfully withheld or unreasonably delayed" within the meaning of 5 U.S.C. 706. What level of court--trial or appellate--should have jurisdiction over such a preliminary challenge? Most direct review statutes do not specifically address this question, and difficult jurisdictional questions have arisen as a result.

The leading decision on this subject is *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (*TRAC*), a case involving a challenge to allegedly unreasonable agency delay. In *TRAC*, the United States Court of Appeals for the District of Columbia Circuit concluded that when the relevant statute assigns review of final agency action (when and if it occurs) exclusively to the court of appeals, then a preliminary challenge also will be subject to exclusive appellate review so long as relief in relation to it might affect the court's ultimate jurisdiction. Based on a court's authority to issue writs in aid of its jurisdiction under the All Writs Act, *TRAC's* holding strongly favors consolidating preliminary challenges in the courts of appeals even when the agency's organic statute does not settle the point.

However, some confusion has followed the *TRAC* decision. Subsequent opinions have grappled at length with the question of what "might affect" the court's jurisdiction and, in some cases, have carved out exceptions to the *TRAC* doctrine. Some district courts, for example, have distinguished certain constitutional claims, for which they have upheld district court jurisdiction.

In addition, some problems have remained because *TRAC* cannot readily be applied to situations in which the agency's final action might take different forms, with different jurisdictional consequences. For example, in some cases the Occupational Safety and Health Administration may decide to issue "standards", which are reviewable in the courts of appeals, or "regulations", which are reviewable in district court. Jurisdictional uncertainty can also occur in preliminary challenges involving Food and Drug Administration approval of new drug applications under the Food, Drug and Cosmetic Act, 21 U.S.C. 355. When the FDA refuses to approve an application, the statute authorizes the applicant to appeal directly to the courts of appeals; this special review provision does not apply, however, to parties challenging FDA approval of a new drug application, who thus must proceed in district court. In cases like these, the *TRAC* rule may require courts to make premature jurisdictional analyses based on speculation about the nature of the action the agency may ultimately take in order to determine whether they can hear the preliminary challenge.

The Conference believes that there is a need for greater clarity in this area. Unless Congress has reason to direct otherwise in a specific statute, jurisdiction over all such preliminary challenges should follow the principle of *TRAC*. The requirement that preliminary challenges be heard exclusively by the court that will ultimately review final agency action may influence a litigator's decision whether to raise an issue preliminarily and thus discourage the bringing of preliminary review proceedings that have little merit but offer some potential for creating delay. In addition, the courts that review final agency action may be more familiar with the substantive programs administered by an agency, and thus better able to evaluate the issues raised in preliminary challenges. To avoid further confusion over proper jurisdiction, the *TRAC* rule should be interpreted to include all cases in which final action would be reviewable in the courts of appeals, and the exceptions that have been carved out by the district courts should be rejected. Where jurisdiction over the final action is unclear, however, preliminary challenges should be cognizable in either the district courts or the courts of appeals.

Some special consideration may be necessary where preliminary challenges involve allegedly unlawful delay by an agency. For these challenges, by definition, time is generally of the essence; moreover, they usually do not require elaborate analysis of the relevant facts or applicable law. Frequently these claims may be resolved more easily and expeditiously through the use of simpler or less formal approaches than through the ordinary course of briefing and oral argument. The courts of appeals should develop techniques for dealing with these cases promptly and practically when they arise. While the most effective measures may vary depending upon the procedural rules applicable in individual courts, possible approaches might include rules permitting, in appropriate cases,

decision on the briefs without oral argument, the filing of petitioners' briefs simultaneously with the notice of appeal, expedited calendaring of delay cases, informal status or settlement conferences involving a single judge, and, where the record may require expansion through factfinding, prompt assignment to a district court, magistrate, or other official for that purpose.

Accordingly, the Conference offers the following recommendation.

## RECOMMENDATION

1. In considering legislation that would assign jurisdiction to review agency action to either district courts or courts of appeals, Congress should:

(a) follow the principles stated in ACUS Recommendation 75-3, *The Choice of Forum for Judicial Review of Agency Action*; and

(b) take special care to consider where preliminary challenges to agency decisionmaking should be brought, specifying whether the district courts or the courts of appeals or both have jurisdiction over such challenges. As a general rule, jurisdiction over reviewable preliminary challenges should be assigned to the forum that would have jurisdiction if an appeal were taken from final agency action growing out of the proceeding.

(c) provide that when the proper forum for judicial review of final agency action may be either the district courts or the courts of appeals, depending upon matters such as the form the agency's action will eventually take or the outcome of the proceeding, any of the courts that might have jurisdiction over final agency action should have jurisdiction over reviewable challenges to the agency's preliminary action (or inaction).

2. In the absence of Congressional direction, the principles identified in paragraph 1(b) and (c) of this recommendation should govern the choice of forum for otherwise reviewable preliminary challenges to agency action.

3. Where jurisdiction over claims involving unlawful delay by an agency lies in the courts of appeals, those courts should assure that their procedures provide adequately for prompt and efficient disposition of such claims.

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\*The Administrative Conference takes no position in this recommendation on whether and under what circumstances such preliminary actions should be deemed judicially reviewable before issuance of a final order by an agency.

***Recommendation 88-7:***  
***Valuation of Human Life in***  
***Regulatory Decisionmaking*** (Adopted September 16, 1988)

Regulations intended to lessen risks of accidents and illness ordinarily impose compliance costs on regulated entities and on rulemaking agencies. In return, society gains numerous benefits, most notably the avoidance of fatalities, injuries and disease, and in some instances a reduction in property damage. Promulgation of such regulations is a multi-faceted process, and this recommendation addresses one set of issues frequently encountered in agency decisionmaking -- the valuation of human life.

Agencies often make reasoned estimates of the reduction in fatalities likely to follow implementation of a particular regulation, or of alternative regulations. It is rarely if ever possible to eliminate risk altogether, and it is nearly always the case that greater risk reduction raises compliance costs. Faced with such situations, agencies cannot avoid placing a value--either explicitly or implicitly--on the societal benefits of risk reduction. Although similar issues are obviously involved when agencies seek to evaluate the benefit of avoiding illnesses or injuries, this recommendation is limited to agency practices and constraints in benefits valuation when the benefit at issue is future lives saved.

Placement of a dollar value on human life is controversial and complex, and a wide array of approaches may be employed. A broad range of dollar values per life saved can be observed in regulatory outcomes across programs and departments. In part, this reflects differing views about what explicit value is suitable for a given type of hazard, and in part it reflects judgments that, for reasons of policy or legal constraints, decisions should take no account of the value of life implicit in those decisions. Some agencies reject all explicit efforts to place a monetary value on human life, while others routinely build such estimates into their regulatory proposals. This diversity can be sharp even within the same department. Those agencies that are willing to utilize explicit normative benchmarks for the value of life appear to be moving toward reliance on the same basic estimation technique, generally referred to as "willingness-to-pay." This technique is premised on the assumption that by examination of marketplace behavior, one can roughly ascertain how much individuals would be willing to pay in order to reduce the probability of death from a particular hazard or cause, or how much they would require in the form of salary increases or other payments to be willing to accept the increased probability. While willingness-to-pay provides the

most inclusive analysis currently available for evaluating the benefits derived from regulatory reduction of fatalities, it falls far short of an ideal process and can produce results that are misleading because the analysis often fails to take into account all relevant variables.

The Conference recognizes the rudimentary state of knowledge on this issue, and realizes that both methodologies and results are likely to continue to vary among agencies. In this environment, however, it would be useful for agencies to take measures that would reveal publicly the processes through which they have determined the valuation of life incorporated in policy decisions. Such a procedure would provide useful clarification and exposition of the unavoidable tradeoffs in regulating hazards, and would also assist in drawing attention to those hazards where further protection may be feasible at acceptable cost.

In this way, agency practice may also be measured against developments in the valuation techniques and evaluated for consistency with other agencies as well as with other regulations in the same agency. The Office of Management and Budget (OMB), in its oversight of executive branch regulatory activities, could facilitate consistency by providing a central clearinghouse for research and information on life valuation issues. OMB should also assist agencies by updating its guidance concerning discount rates used by agencies in deriving present value equivalents of future effects. The current government-wide general guidance on discounting is contained in OMB Circular A-94 which has not been updated since 1972.

## **RECOMMENDATION**

1. When an agency adopts a regulation that is intended to reduce the risk to human life, based on a judgment that the associated compliance costs are justified, the agency should disclose the dollar value per statistical life used for the purposes of that determination. Such statements and disclosures should also set forth the human life valuation implications of alternative levels of regulatory stringency considered by the agency. Exceptions to this principle may be appropriate where empirical information about either the costs or benefits of the regulation is highly conjectural, or where the benefits include values which cannot be quantified in market terms, *e.g.*, aesthetic gains. In such cases, agencies should explain the nature and degree of imprecision in the valuation process so that the public will not be misled. When an agency declines to adopt a regulation due to these considerations, it should provide similar information.

2. In implementing paragraph 1, agencies that develop and use methodologies for placing a monetary value on human life should recognize that there remain substantial limitations of current methodology to incorporate all the variables that affect societal valuations of human life. An agency should explain the factors included or considered in its valuation. The agency also should explain how it weighs such factors.

3. Whenever agencies choose to discount costs and benefits in implementing paragraph 1, they should clearly and fully disclose what rates they are using, the methodology that generated those rates, and the sensitivity of outcomes to the particular rates applied. The Office of Management and Budget (OMB) should revise its guidance concerning the use of a discount rate in the valuation of costs and benefits to reflect recent learning on the subject, either through updating OMB Circular A-94 or by other means. Such guidance should articulate the various methods by which a discount rate can be derived and the scope of subjects to which it can be applied.

4. OMB should serve federal agencies as a central clearinghouse for research and information on life valuation issues. To this end, OMB should continue and expand its discussion of agency practices in the life valuation area, initiated in the 1987-88 edition of the annual Regulatory Program of the United States Government.

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\*In 1979, the Conference made a similar recommendation about cost-benefit analyses, Recommendation 79-4, *Public Disclosure Concerning the Use of Cost-Benefit and Similar Analyses in Regulation*, 1 C.F.R. 305.79-4 (1988).

**Recommendation 88-8:**  
**Resolution of Claims Against Savings**  
**Receiverships** (Adopted September 16, 1988)

When a federally insured savings and loan institution ("thrift") fails, the Federal Home Loan Bank Board (FHLBB) exercises overall regulatory control. The Federal Savings and Loan Insurance Corporation (FSLIC), under the direction of the FHLBB, ordinarily acts as receiver for federally insured thrifts, and, in that capacity, must pay the valid credit obligations of the failed thrift. In the process of accepting, settling or rejecting a diverse and complex range of creditor claims, the FSLIC attempts to resolve disputes informally. If this cannot be done, claimants may resort to an adjudicative process. The locus of this adjudication -- agency or court--and its elements are the concerns of this recommendation.

**Exclusivity of the Agency Adjudication Process.** The FHLBB and its sister agency, the FSLIC, have asserted exclusive jurisdiction to adjudicate creditor claims against thrift receiverships. To establish and enforce its asserted power as receiver to adjudicate creditor claims, the FSLIC has adopted the practice of seeking to have claims litigation that has been initiated in state courts removed to the federal courts, where the FSLIC then moves for dismissal for want of subject matter jurisdiction. The agency has sometimes moved to override court judgments granted to creditors that were entered before a thrift was placed in receivership.

The FSLIC's argument is that, as receiver, it has been vested with exclusive power to determine the validity of creditor claims, and that the jurisdiction of the courts to make independent determinations has been precluded. It is further argued by the FHLBB and FSLIC that their final administrative determinations are subject, not to *de novo* judicial review, but only to the limited judicial review provided under the Administrative Procedure Act. This agency position has become known as the *Hudspeth* doctrine, after the Fifth Circuit decision in which it was first accepted (*North Mississippi Savings and Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985)). But other courts have declined to follow *Hudspeth*. See, e.g., *Morrison-Knudsen Co., Inc. v. CHG International, Inc.*, 811 F.2d 1209 (9th Cir. 1987), holding that the FSLIC has no statutory authority to adjudicate claims to the exclusion of the courts. The U.S. Supreme Court has granted *certiorari* to resolve the differences. See *Coit Independence Joint Venture v. First South, F.A.*, 829 F.2d 563 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1105 (1988).

Because of the considerable adjudicatory power that the *Hudspeth* doctrine potentially grants to the FSLIC, the doctrine has provoked controversy concerning the fairness, efficiency, and legal and constitutional validity of the administrative procedures. In fact, the position of the

Solicitor General in its brief for the Government in the *Coit* case does not endorse the FHLBB's argument that it is statutorily empowered to "adjudicate" these claims. The Solicitor General maintains that, while Congress could have provided for administrative adjudication in this context, it has simply (and appropriately) provided for a claims review step in the process that must be exhausted by claimants before they seek judicial resolution of claims.

The Conference takes no position on the statutory and constitutional power of the FHLBB to resolve these claims. Unless the Supreme Court finds administrative adjudication in this context to be constitutionally impermissible, Congress should examine the need for agency adjudication of such claims, as an alternative to, or at least a required prelude to, *de novo* resolution of such claims in state and federal courts. For this reason, the Conference has examined the fairness and efficiency of the current administrative procedure for determining creditor claims against thrift receiverships.

**Current Claims Procedures.** Claims against failed thrifts are institutionally and procedurally separated at the FSLIC. Those made by insured depositors on the one hand, and uninsured depositors and other creditors on the other, are handled by separate divisions within the FSLIC. Although many claims are resolved at the division level (so-called "receiver's determinations"), rejected claimants may seek administrative review by the Adjudication Division of the FHLBB's Office of General Counsel, with final administrative review by the Board itself in complex cases. Though the case law is unsettled, *de novo* judicial review has been allowed in the case of insured depositor claims and, under the *Hudspeth* decision, limited judicial review under the Administrative Procedure Act was contemplated in the case of noninsured and general creditor claims.

**Need for Congressional Attention.** As thrift receiverships proliferate, the Conference urges Congress to consider whether it is more appropriate for disputes over claims filed against such receiverships to be decided by the FHLBB, or whether it is better to leave them to *de novo* resolution in state and federal courts--with or without a prior administrative claims review step at the FHLBB.

If Congress does determine that an administrative adjudication process (coupled with appropriate judicial review) is the preferable approach, it should clarify the FHLBB's statutory authority. It should provide for an adjudicative system that makes clear that claimants have an opportunity to have their claims heard by adjudicators who are completely independent of other offices of the FHLBB or FSLIC, which may be perceived to have a financial interest in the outcome of such claims. To that end, a bifurcated hearing process should be established, offering claimants who can demonstrate that an issue of material fact is genuinely presented an opportunity for an on-the-record APA hearing presided over by an administrative law judge. An alternative, simplified procedure should be authorized for other cases or where parties agree to use it.

The FHLBB's current program of adjudicating claims against receiverships requires two additional improvements. First, final rules of practice need to be issued,<sup>1</sup> and time limits should be established. Second, the agency should refrain from attempting to override prereceivership judgments entered in federal or state courts.

## RECOMMENDATION

1. Congress should determine whether disputes over claims filed against thrift receiverships are better decided by the Federal Home Loan Bank Board (FHLBB) in an administrative adjudication process (coupled with judicial review) or by the judiciary through *de novo* resolution in state or federal courts (with or without a prior administrative claims review step at the FHLBB).<sup>2</sup>

2. If Congress does determine that an administrative adjudication process is the more desirable approach, it should clarify the FHLBB's statutory authority by providing for an FHLBB adjudicative process along the lines set forth below:

a) A bifurcated process should be established for adjudicating claimant appeals from determinations of thrift receivers. Where the claimant affirmatively demonstrates that an issue of material fact is genuinely presented, the FHLBB should offer an opportunity for an on-the-record APA hearing, presided over by an administrative law judge. In all other cases, or where the parties voluntarily agree, the FHLBB should be authorized to use simplified, less formal procedures, presided over by persons who need not be ALJs but who should be institutionally separate from the receiver.<sup>3</sup> All parties, including receivers, should be encouraged to engage in alternative means of dispute resolution.<sup>4</sup>

b) Final FHLBB decisions on such claims should be based on the administrative record and subject to direct judicial review in accordance with the principles stated in ACUS Recommendation 75-3 ("The Choice of Forum for Judicial Review of Administrative Action").

3. The FHLBB should publish, after a notice-and-comment rulemaking procedure, final rules setting forth its rules of practice for claims determinations. The rules should provide for strict, albeit reasonable, time limits<sup>5</sup> applicable not only to claimants but also to receivers and their agents.

4. The FHLBB (and FSLIC as receiver) should not override prereceivership judgments entered in federal and state courts. The

agencies' power to adjudicate claims should not encompass judgments in favor of creditors that have been entered by a court of competent jurisdiction before the thrift was placed in receivership. The FSLIC as receiver should either acquiesce in these judgments or pursue post-trial remedies.

5. Congress should include in any legislation responsive to this recommendation a requirement that the FHLBB adopt appropriate regulations and policies as set out in paragraphs 3 and 4.

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1. On November 8, 1985 the FHLBB published proposed rules governing its claims adjudication process (see 50 Fed. Reg. 48970). On April 21, 1988 the FHLBB published interim procedures pending the adoption of final regulations, giving notice that the interim procedures that have been in effect in practice since July 1, 1986 will remain in effect pending the adoption of final regulations. See 53 Fed. Reg. 13105.

2. The Conference, at this time, does not intend to express an opinion on which of these alternatives is preferable.

3. See ACUS Statement, "Dispute Resolution Procedure in Reparations and Similar Cases," 1 CFR 310.13 (1988).

4. See ACUS Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution," 1 CFR 305.86-3 (1988).

5. See ACUS Recommendation 78-3, "Time Limits on Agency Action," 1 CFR 305.78-3 (1988).

## ***Recommendation 88-9 : Presidential Review of Agency Rulemaking*** (Adopted December 8, 1988)

Federal regulation has grown in both scope and complexity in recent decades. Among its wide variety of national goals are: ensuring competitive markets, spurring economic growth, checking inflation, reducing unemployment, protecting national security, assuring equal opportunity, increasing social security, protecting the environment, ensuring safety, and improving energy sufficiency. Policies implementing these goals compete for scarce resources and sometimes conflict with one another. Thus, a central task of modern democratic government is to make wise choices among the courses of action that pursue one or more of these goals.

While Congress establishes the goals, it seldom legislates the details of every action taken in pursuit of these goals or makes the balancing choices that these decisions require. It has assigned this task to the regulatory agencies. Each regulatory agency, however, usually is given a set of primary goals, without specific regard for whether proposed actions in pursuit of those goals might conflict with the pursuit of other goals by other agencies. An effective mechanism is needed to coordinate agency decisions with the judgments of officials having a broader perspective, such as the President and Congress.<sup>1</sup>

Some form of presidential review of agency rulemaking has been the practice since at least 1971. Like its predecessors, the current program is established by presidential executive order.<sup>2</sup> The responsible officer (the Administrator, Office of Information and Regulatory Affairs, in the Office of Management and Budget) is appointed by the President, subject to Senate confirmation.

The Conference believes that there is sufficient experience under these executive orders to warrant continuing such review with certain guidelines as to its implementation. The Recommendation below sets forth standards that should be followed whether review is governed by executive order or by a general statute. It also assumes that the President has the authority to enunciate principles to guide agency rulemaking, even though the programmatic responsibilities are by statute delegated to agencies. In addressing the presidential review process, the Conference recognizes that some of the issues are analogous to congressional involvement in agency rulemaking, but it does not address this latter subject at this time.

### **RECOMMENDATION**

The Conference recommends that the following principles should guide any program of presidential review<sup>3</sup> of agency rulemaking:

## **1. General Applicability**

Presidential review should apply generally to federal rulemaking. Such review can improve the coordination of agency actions and resolve conflicts among agency rules and assist in the implementation of national priorities. However, not all agency rules or categories of rules may be appropriate for such presidential review. Exempt categories include formal rulemaking, ratemaking, and rulemaking that resolves conflicting private claims to a valuable privilege.

## **2. Applicability to Independent Regulatory Agencies**

As a matter of principle, presidential review of rulemaking should apply to independent regulatory agencies to the same extent it applies to the rulemaking of Executive Branch departments and other agencies.

## **3. Timeliness of Review**

The process of presidential review of rulemaking, including agency participation, should be completed in a timely fashion by the reviewing office and, when so required, by the agencies, with due regard to applicable administrative, executive, judicial and statutory deadlines.

## **4. Public Disclosure of Documents**

(a) *Proposed or Final Rules.* Where an agency submits a draft proposed or final rule for presidential review, the agency submission and any additional formal analyses<sup>4</sup> submitted for presidential review should be made available to the public when the proposed or final rule to which they pertain is published. If a decision is made to terminate a rulemaking after a notice of proposed rulemaking has been published, agency submissions to the office responsible for presidential review and any additional formal analyses submitted for review should be made available to the public when the decision to terminate is announced.

(b) *Review of Agendas or Other Summaries or Schedules of Agency Rulemaking Actions.* Where an agency submits agendas or other summaries or schedules of pending or planned rulemakings for presidential review, the agency should be made available to the public once the agenda or other summary or schedule is made known to the public in an official publication.

## **5. Executive Branch Communications Relating to Presidential Review of Rulemaking**

(a) *Policy Guidance.* An agency engaged in informal rulemaking should be free to receive policy guidance concerning that rulemaking at any time from the President, members of the Executive Office of the President, and other members of the Executive Branch, without having a duty to place these communications in the public file of the rulemaking unless otherwise required by law. However, official written policy guidance from the officer responsible for presidential review of rulemaking should be included in the public file of the rulemaking once a notice of proposed rulemaking or final rule to which it pertains is issued or when the rulemaking is terminated without issuance of a final rule.<sup>5</sup>

(b) *Factual Information* When an agency engaged in rulemaking receives a communication from the office responsible for presidential review which contains factual information relating to the substance of the rulemaking that is not already in the public file, the agency should promptly place the communication (or if oral, a summary) in the public file of the rulemaking.<sup>6</sup>

(c) *Communications Transmitting Outside Comments* When an agency receives a communication from the office responsible for presidential review which transmits any factual submissions or the views or positions of persons outside the government, the agency should promptly place the communication (or if oral, a summary) in the public file of the rulemaking.<sup>7</sup>

#### **6. Responsibility of the Reviewing Office Regarding Outside Comments**

The officer responsible for presidential review of rulemaking should not allow the process of review to serve as a conduit to the rulemaking agency for unrecorded communications from persons outside the government. To guard against such occurrence, the responsible officer should take appropriate steps--and the following should be considered:

(a) identifying any communications to the rulemaking agency that transmit the views or positions of persons outside the government;

(b) promptly transmitting written communications received by the office responsible for presidential review from persons outside the government relating to the substance of a proposed agency rule to the rulemaking agency for inclusion in the public file of the rulemaking;

(c) maintaining a list identifying the time and general topic of oral communications that pertain to the substance of an agency rule under review with persons outside the government and making such list available to the rulemaking agency for inclusion in the public file; and

(d) inviting a representative of the rulemaking agency to attend any meetings between the reviewing office and persons outside the government which pertain to any agency rulemaking under review by that office. The agency representative attending any such meeting should prepare an appropriate summary of the discussion and promptly place it in the public file of the rulemaking.

#### **7. Not Judicially Reviewable**

The presidential review process should be designed to improve the internal management of the federal government and should not create any substantive or procedural rights enforceable by judicial review.

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1. The need for greater coordination of federal regulation was recognized in 1979 by the American Bar Association's Commission on Law and the Economy.

2. Exec. Orders Nos. 11,821, 11,949 (President Ford), Exec. Order 12,044 (President Carter), Exec. Orders Nos. 12,291, 12,498 (President Reagan). For a thorough analysis of the experience under the executive orders, *see* NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, PRESIDENTIAL MANAGEMENT OF RULEMAKING IN REGULATORY AGENCIES (January 1987).

3. Presidential review, as used in this Recommendation, refers to a program of systematic executive oversight and dialogue that involves coordinating agency actions where conflicts exist, and in all cases probing the agency's fact and policy judgments, with the purpose of ensuring that the agency considers factors of importance to the President's policies to the extent permitted by law. Such review does not displace responsibilities placed in the agency by the President (or the President's delegates) of agency rulemaking pursuant to the President's constitutional authority is not within the scope of this Recommendation.

4. *See* ACUS Recommendation 85-2, Agency Procedures for Performing Regulatory Analysis of Rules, 1 CFR 305.85-2.

5. The Conference's position on the public availability of official written policy guidance stated in this Recommendation modifies its earlier position in Recommendation 80-6, Intragovernmental Communications in Informal Rulemaking Proceedings, 1 CFR 305.80-6, 1.

6. Agencies also should place factual information received from other sources in the public file of the rulemaking, *see* Recommendation 80-6, 2.

7. This reaffirms the Conference's position on the handling of comments by persons outside the government stated in Recommendation 80-6, 2.

***Recommendation 88-10:  
Federal Agency Use of Computers in Acquiring and  
Releasing Information (Adopted December 9, 1988)***

The rapid evolution of computer technology raises many economic and policy issues that affect the acquisition and release of information by government agencies. New information technologies can improve public access to public information and reduce paperwork burdens. They can also impose significant economic burdens, however, and they may stimulate competition between government agencies and established electronic information enterprises. The essential role of information in a democratic system underscores the need to examine with care the opportunities that electronic information storage and transmission provide for improving the flow of information between government agencies and the public.

The following recommendations are intended to guide agencies in addressing the questions that will arise when an agency considers whether to acquire or release information in electronic form, either to facilitate performance of the agency's mission or to fulfill requirements established by the Freedom of Information Act (FOIA) or other laws.<sup>1</sup>

At the present stage in the evolution of government electronic information policy, the most one can do is to suggest an analytical framework within which agency electronic system designers, policy makers, and budget planners can assess their options. The process and substance of decisionmaking within this framework should, of course, conform with general principles of administrative law.

Because experience is now relatively limited and information technology is subject to rapid evolution, when Congress sets policy it should do so on as broad a basis as possible. Because changes in electronic information capability occur at a different pace in different sectors of the society, transitional arrangements will be necessary to ensure that electronic acquisition and release do not disadvantage major segments of the population.

The pertinent considerations depend on the context in which electronic acquisition or release of information is addressed. For example, the factors relevant to the release of information in electronic form in response to discrete FOIA requests differ from those that bear on discretionary agency decisions to release information broadly through electronic publishing. As a further example, resolution of issues pertaining to the acquisition of information in electronic form might depend on

such factors as the technological capacity of the private parties from whom electronic filing is to be requested.

Recommendation A addresses the Freedom of Information Act. The FOIA was written with paper records in mind. The problem is to apply the Act to information maintained in electronic form. This recommendation does not seek to provide comprehensive guidance but does address in general terms such matters as whether electronic records should be deemed records subject to the FOIA and whether an agency should be expected to write new computer programs for the purpose of responding to a FOIA request.

Recommendations B and C discuss principles applicable to electronic acquisition and release of information, respectively. Recommendation D offers principles for defining the appropriate roles of the public and private sectors in the provision of electronic acquisition and release systems.

Recommendations C and D envision a three-step process for evaluating possible new electronic information products. The first step in the evaluation process is to identify the current level of release of the information that would be contained in a new electronic information product. There are in general terms three possible levels of agency activity in releasing information: (i) "dissemination" or "publishing", leading to the broadest availability of information; (ii) "disclosure", involving wholesaling to private information suppliers or providing electronic release capability in public reference rooms; and (iii) "access", involving ad hoc release in response to discrete requests. For the special meaning of these and other related terms used in this recommendation, it is important to refer to the appended glossary.

The second step is to identify the benefits and costs of replacing or supplementing existing means of release with various levels of electronic release. An agency should not offer an electronic information product unless the cost-benefit analysis demonstrates that the electronic alternative analyzed is likely to be superior to existing means. The third step is to define the most desirable public and private sector roles, applying principles described in Recommendation D.

Deciding to "promote" electronic publishing does not necessarily mean a direct, retail, electronic publishing and distribution role for the government, if private sector electronic publishing activities and commitments are more cost effective (see Recommendation D). Electronic publishing contemplated by this recommendation also can occur through depository libraries. In some cases it may be appropriate to retain both paper and electronic versions of the same information, even though costs almost certainly will be higher than for either form alone.

Recommendation E identifies cost and benefit categories that should be considered in applying Recommendations B, C and D. Recommendations F through J deal with discrete questions of policy and technology: for example, the use of private telecommunications systems,

the undesirability of exclusive private or public control of information, and the need to stay abreast of developing technologies.

These recommendations do not address such important issues as protection of trade secrets or privileged commercial information, invasion of personal privacy, or the need for Congress and agencies to consider allocating budgetary resources so that FOIA staffs will include persons skilled in using electronic databases. Nor do they address in detail the security of electronic databases. Those subjects deserve separate investigation.

The recommendations also do not address issues pertaining to automation of internal agency functions including important questions of records retention, evidentiary use of electronic records, and program administration. Rather the recommendations assume that an agency has automated or will automate an identifiable portion of its activities and therefore is confronted with the questions of whether and how to establish interfaces between internal electronic information systems and the outside world.

## **RECOMMENDATIONS**

### **A. Freedom of Information Act**

1. In interpreting the Freedom of Information Act, agencies should recognize that a "record" includes information maintained in electronic form.

2. Agencies using electronic databases rather than paper records should not deny access to the electronic data on the grounds that the electronic data are not "records," that retrieval of the electronic information is equivalent to creation of a "new" record, or that programming is required for retrieval. In responding to FOIA requests, agencies should provide electronic information in the form in which it is maintained or, if so requested, in such other form as can be generated directly and with reasonable effort from existing databases with existing software. Agencies, however, should not be obligated under the FOIA to create large new databases for private advantage, thus using agency resources for private purposes. Agencies should use a standard of reasonableness in determining the nature and extent of the programming that provides an appropriate search for and retrieval of records in responding to FOIA requests, and in determining the extent to which FOIA requesters may ask the agency to produce data organized in formats other than those used by the agency in the regular course of its operations.<sup>2</sup>

3. Differences in technologies and database structures used by individual agencies make it necessary, for the near term, to define FOIA

obligations on a case-by-case basis. Further experience with electronic information systems is a prerequisite to the formulation of general rules applicable to such controversies under the Act as how requesters must identify the records sought, how much programming, if any, an agency must do, and how costs shall be borne. The concept of reasonableness applied to searches for paper information made in response to FOIA requests should provide a useful guideline for resolving controversies over the application of FOIA to electronically maintained data.

## **B. Acquisition of Information in Electronic Form**

1. Agencies should acquire information in electronic form when they use, or will use, the information in that form and when most information submitters already maintain information electronically, or have ready access to intermediaries who will prepare and submit it in electronic form. When agencies sponsor electronic acquisition programs, they should make clear their intention that all information required will eventually be available to them in electronic form, either by strictly administering exceptions to mandatory programs, or by undertaking the conversion of paper submissions into electronic form themselves.

2. When most providers of information ("filers") are technologically sophisticated, it is appropriate for agencies to require electronic filing of information, after developing standard formats in consultation with the filer community, and after appropriate testing and transition periods.

3. In determining whether to require or permit electronic filing of information and in designing the particulars of an electronic acquisition program, agencies should carefully weigh the costs and benefits of electronic acquisition of information. The analysis should address the factors identified in Recommendation D together with other considerations made relevant by the agency's mandate.

4. Agencies initiating electronic acquisition programs should take steps to facilitate electronic filing by entities having limited technological capacity (without raising the costs for sophisticated entities), including the optional use of "smart forms." When a significant proportion of the filer community is technologically unsophisticated, electronic acquisition may be feasible only through intermediaries. In such cases, agencies should create economic incentives for electronic filing rather than mandating it. Part of the economic incentive to file electronically under voluntary electronic acquisition programs can be the imposition of a fee on technologically sophisticated filers who choose to file on paper, assuming the statutory authority to do so exists.

### **C. Release of Information in Electronic Form**

1. Electronic information release policies should depend on such factors as (a) whether the desired level of release consists of electronic publishing, electronic disclosure, or electronic access in response to FOIA requests (see the glossary for definitions of these terms); (b) the agency's policies in releasing like information maintained in paper records; and (c) the costs and benefits of replacing or supplementing an existing paper medium with an electronic medium.

2. When a statute or agency policy mandates the publishing of information, the agency should itself electronically publish the information or facilitate its electronic publication by others, unless the cost-benefit analysis suggests the desirability of restricting publishing to the paper medium, possibly accompanied by a lower level of electronic release.<sup>3</sup> If the agency publishes the information only on paper, it should consider electronic publication of the availability of the paper information products. Where an agency publishes information electronically, it should consider the feasibility of providing dial-up access.

3. When a statute mandates public reference room disclosure, or paper products presently are made available through a public reference room, agencies should provide electronic disclosure in public reference rooms of information already in electronic form. Such agencies should consider the costs and benefits of upgrading from electronic disclosure to electronic publishing. Agencies should also make information disclosed electronically available to any requester in an electronic form that would be easily usable by information resellers.

4. In those instances where an agency maintaining information in electronic form has no mandate to release information other than in response to FOIA requests, the agency should consider upgrading release of appropriate parts of this information to electronic disclosure through public reference rooms and wholesaling in electronic bulk form to private sector requesters.<sup>4</sup>

### **D. Allocation of Responsibilities Between Public and Private Sectors**

1. Agencies that have decided under Recommendations B and C to acquire or release information in electronic form should define the appropriate roles of the public and private sectors in providing that information and related products (including telecommunications facilities, indexes and retrieval software as well as raw data). That choice should depend on the relative costs and benefits of privately versus publicly provided information products.

2. When choosing between publishing and a lower level of electronic release of information, an agency should determine whether private sector providers are willing to supply electronic products having features (e.g., user-friendly menus) that will give the public greater benefits or lower costs than would electronic publishing by the agency. When an agency relies on the private sector for electronic publishing of agency information, the agency should seek to establish by contract the nature of the products to be provided.

3. When an agency determines that its mission warrants new electronic means of acquisition or release of information and the private sector will not commit to provide them at appropriate prices, the agency should provide them, if clearly identified non-economic and economic benefits outweigh the capital and marginal costs. Agencies should recognize, however, that there may be circumstances where the costs to an agency would suggest the wisdom of creating incentives for the private provision of the desired electronic information product -- for example, the free use of agency-developed software.

#### **E. Determination of Costs and Benefits**

1. Agencies should take into account the following costs in the decisionmaking processes suggested in Recommendations B, C and D:

(a) Capital costs to the agency of establishing the product, and the probable economic life and other uses over which the costs should be allocated;

(b) Capital costs to information consumers and information providers to utilize the product, and the probable economic life and other uses over which these costs should be allocated;

(c) The marginal costs to the agency for user access;

(d) Marginal costs to users for obtaining the information;

(e) Marginal costs to electronic information providers of updating the electronic information;

(f) Unrecovered costs associated with existing government or private sector capital that would be made obsolete by the new product;

(g) The costs of updates and upgrades in service levels or capacity necessary to permit intended benefits to be realized at levels of demand expected over the long term; and

(h) Costs of changing to standard formats or of handling different formats.

2. Agencies should take into account the following benefits in decisionmaking processes suggested in Recommendations B, C and D:

(a) Savings associated with eliminating the cost of producing and maintaining existing paper products;

(b) Savings to agencies and consumers associated with upgrading the level of information release from ad hoc FOIA disclosure to electronic disclosure in a public reference room;

(c) Savings to agencies and consumers associated with upgrading paper public reference room disclosure to electronic publishing;

(d) Increase in the number of interested persons having access to information;

(e) Improvements in the utility of information for its intended purpose because of improved organization and retrieval capabilities; and

(f) Reductions in delays associated with transferring information from an agency to eventual consumers.

3. Cost-benefit analyses should take into account FOIA obligations, including obligations to protect trade secrets and other exempt information. In designing electronic databases, agencies should consider the types of FOIA requests likely to be received for data in the database, consulting with representative users when feasible. Insofar as it is consistent with agency mission performance, databases should be designed so as to facilitate responses to FOIA requests. A proper rule of thumb is that it should not be any more difficult to obtain information under the FOIA after automation than before.

4. In some cases, effective design may require some sacrifices in electronic FOIA retrieval capability. In these cases, agency designers of electronic databases and retrieval software should consider how FOIA requests can be satisfied consistent with the spirit of the Act. For example, an agency might choose to make raw data available to requesters in computer-readable form along with retrieval software, so that requesters can effect their own retrievals. In other situations, new electronic information products may reduce costs of FOIA requests, to both requesters and agencies. This would occur, for example, if information were published or otherwise made accessible electronically in a public reference room, rather than provided only on paper in response to FOIA requests.

## **F. Exclusive Control of Public Information**

An agency generally should not grant a private party exclusive control of its electronic information or of the acquisition or release thereof. Nor should the agency itself as a general matter maintain such control in the absence of a compelling public purpose. Where an agency has, and wishes to exercise, authority to enter into an exclusive arrangement providing a private sector vendor with a preferential right to electronic information, the agency should first consider whether the analysis suggested in Recommendations B, C, D and E demonstrates that efficiencies can be achieved through such an arrangement. The agency should also guard against the possibility that the arrangement may be inconsistent with its responsibilities under the FOIA or may impair the ability of the agency and the public to benefit from subsequent technological developments.

## **G. Technology Issues**

1. Agencies should use proven technologies in their electronic acquisition and release systems. They should stay abreast of the state-of-the-art in all matters related to the electronic acquisition and release of information and should be particularly alert to the need for up-to-date and effective access control and other techniques required to maintain an appropriate level of security.

2. Agencies should seek to base electronic information formats on existing standards efforts such as American National Standards Institute standards on Electronic Business Data Interchange<sup>5</sup> before developing their own distinctive format definitions.<sup>6</sup>

3. Whenever possible, agencies should use public data networks rather than developing their own communications links for public filers or consumers.

4. Agencies should consider conducting demonstration projects to experiment with evolving electronic information technology.

## **H. Electronic Participation in Administrative Proceedings**

Agencies should experiment with electronic means of providing public participation in rulemaking, adjudication and other administrative proceedings, while retaining a means of effective participation for persons who lack the means to access the electronic information system.

## **I. Government-wide Policy on Electronic Information**

1. A government-wide policy on electronic information is desirable to afford guidance to agencies. Such a policy should articulate goals consistent with those expressed in the foregoing recommendations.

2. Congress should formulate the larger value judgments necessary for a government-wide policy on electronic information.<sup>7</sup> These include the roles of public and private sectors; who ought to pay for increased information utility; and the level of funding to be provided by the government.

3. Because agencies often are in the best position to apply the considerations identified in this recommendation, Congress should normally defer to agency judgment in selecting methods to implement congressionally enacted policies when the agencies have offered rational justifications for their electronic information program decisions.

## J. National Institute of Standards and Technology

The National Institute of Standards and Technology should continue to work with the U. S. Patent and Trademark Office to advance electronic data storage and transmission technology, as, for example, its work with high-capacity storage technology, and should inform agencies about commercially available products and services to facilitate electronic acquisition and communications.

## GLOSSARY

**Bulk form:** large quantities of data in nearly raw form, with little formatting information or other added value, usually maintained and transferred on magnetic tape or cassettes or high capacity optical or magnetic disks.

**Data product:** a specific form of electronic information, sometimes including data structures, indices, retrieval software, and telecommunications links.

**Database:** a body of information maintained in electronic form, from which parts can be retrieved electronically.

**Dial-up:** a form of electronic dissemination through which anyone with a computer, a modem, and access to an ordinary telephone line can retrieve information from an electronic database.

**Electronic access:** the lowest level of electronic release; the ability to obtain agency information; communicating information to consumers.

**Electronic acquisition:** obtaining information from the public electronically; includes electronic filing; submitting information to an agency in electronic form.

**Electronic disclosure:** an intermediate level of electronic release; making information available electronically to the public at one or only a few places.

**Electronic dissemination:** the highest level of electronic release; using electronic means to make information widely available to the public at places where it is used; same as electronic publishing.

**Electronic publishing:** same as electronic dissemination.

**Electronic release:** communicating information to users in electronic form; a generic term that includes access, disclosure, and dissemination.

**Hardware:** computers and associated peripherals.

**Public data networks:** communications common carriers that aggregate small volume data communications and thereby reduce the cost of high-quality transmission of data.

**Retailing:** providing information in a format different from that used by the government, or with accompanying analysis, aggregation or segregated subsets, enhanced search or retrieval capabilities, or other-

wise tailored to be of value to specialized or individual end users; also may include distribution components of electronic release.

**Retrieval:** extracting a part of a database and presenting it to the requester in a form understandable by humans.

**Smart forms:** interactive computer data acquisition programs that guide the filer in answering questions.

**Software:** computer programs or data.

**Wholesaling:** providing resellers or large end users information only in the form used by the government or only in bulk form.

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1. OMB Circular A-130 (50 Fed. Reg. 52730, Dec. 24, 1985) provides a general framework for management of federal information resources. The relationship between parts of this recommendation and provisions of the OMB Circular is as follows. Recommendation A reflects the same policy as Paragraph 7(g) of the Circular, but provides additional detail. Recommendation B deals with electronic acquisition, a subject addressed in proposed OMB guidelines, but not in detail in the existing version of Circular A-130. Recommendation C suggests a cost-benefit approach to defining agency electronic dissemination activities essentially consistent with that prescribed by the Circular, but offers a finer level of analytical detail to guide agency selection among three different levels of release. Recommendation D suggests defining the boundary between public and private sectors based on a cost-benefit analysis; this is endorsed by Paragraph 7(e) of Circular A-130, but Recommendation D defers less to private sector activities than the Circular. Recommendation E lists more specific cost and benefit categories to be considered than does the Circular. Recommendation F reflects the same policy as that set forth in Appendix IV to Circular A-130 (discussing paragraph 11(a)). Recommendations G and H have no counterparts in the Circular. Recommendation I discusses the role and limits of government-wide policy; Circular A-130 is an example of such a policy. Recommendation J is consistent with Paragraph 9(c) of the Circular.

2. Agencies should be able to recover the costs of complying with FOIA requests, including programming costs, in a manner consistent with the Freedom of Information Reform Act of 1986, 100 Stat. 3207, 3207-48 (1986), amending 5 U.S.C. 552(a)(4)(A), and related OMB guidance, 52 Fed. Reg. 10012, 10017 (1987).

3. When a statute mandates electronic publishing, the agency would not have discretion to restrict publication to a paper medium or to a lower level of electronic release.

4. The prices for such electronic information would be determined under the general user fee statute, 31 U.S.C. 9701, or under the FOIA. See OMB's user fee guidelines, restated in App. IV to OMB Circular A-130, 50 Fed. Reg. 52748 (1985).

5. These standards are currently designated as "X.12".

6. Cf. Recommendation 78-4, Federal Agency Interaction with Private Standard-setting Organizations in Health and Safety Regulation, 1 CFR 305.78-4.

7. See, e.g., U.S. Congress, Office of Technology Assessment, *Informing the Nation: Federal Information Dissemination in an Electronic Age* (October 1988).

***Recommendation 88-11:***  
***Encouraging Settlements by Protecting Mediator***  
***Confidentiality (Adopted December 9, 1988)***

The resolution of issues through negotiations among the affected parties has long been recognized as an essential ingredient of the administrative process. Settlements bring to bear parties' experience, foster creative solutions, and result in faster decisions requiring fewer resources than formal litigation. Most settlements now occur simply through ad hoc negotiations among the lawyers for the parties, generally on the eve of hearing. The Administrative Conference has recommended that agencies adopt alternative means of dispute resolution ("ADR") to enhance negotiations and stimulate the possibility of reaching agreement expeditiously within the confines of the agency's authority and policy.

This recommendation seeks to encourage agency use of alternative means of dispute resolution by affording appropriate protection to communications between the parties and the neutral in settlement negotiations. The Conference, of course, recognizes the principle that decisions affecting the public welfare ought to be made in the open and subject to public and judicial scrutiny. Nevertheless, since settlements are essential to administrative agencies, a careful balance must be struck between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements. This recommendation attempts to strike that balance, without thwarting open decisionmaking.

Most ADR techniques, including mediation, non-binding arbitration, factfinding and minitrials, involve a neutral third party who aids the parties in reaching agreement that resolves the issues in controversy. A skillful mediator can speed negotiations and increase chances for agreement by holding separate confidential meetings with the parties, where each party may give the mediator a relatively full and candid account of its own interests (rather than its litigating position), discuss what it would be willing to accept, and consider alternative approaches. The mediator, armed with this information but avoiding premature disclosure of its details, can then help to shape the negotiations in such a way that they will proceed most directly to their goal. The mediator may also carry messages between the parties, launch "trial balloons," and act as an agent of reality to reduce the likelihood of miscalculation. This structure can make it safe for the parties to talk candidly and to raise sensitive issues and creative ideas. In non-binding arbitration, minitrials and factfinding, the neutral may play a different role from that of a mediator, because he may issue a tentative decision that is then used as a basis for negotiations, but all of these neutrals have the common characteristic of helping the parties negotiate an agreement.

With all of these neutrals, many of the benefits of ADR can be achieved only if the proceedings are held confidential. Confidentiality assures the parties that what is said in the discussions will be limited to the negotiations alone so they can be free to be forthcoming. This need extends to the neutral's materials, such as notes and reports, which are produced solely to assist the neutral in the negotiation process and which others could misconstrue as indicating a bias against some party or interest. This is why many mediators routinely destroy their personal notes and drafts and return all other materials to the parties. Moreover, if the neutral were to testify in a subsequent proceeding as to what went on during the negotiations, his neutrality might be destroyed. The ADR process could be jeopardized because one party or another is likely to feel disadvantaged. Also, the parties would justifiably feel their confidences might be threatened. All this would certainly inhibit future participation by parties and neutrals.

Limited protection for settlement negotiations and work product developed in preparation for litigation is provided by Rule 408 of the Federal Rules of Evidence and Rule 26(b)(3) of the Federal Rules of Civil Procedure. However, uncertainties as to their application--not to mention the effects on confidentiality of the Freedom of Information Act--may raise obstacles to protecting communications with ADR neutrals in federal agencies' disputes. As a result, many statutes, rules, and guidelines have explicitly provided for some degree of confidentiality of mediation and similar materials.

The Administrative Conference takes the view that maintaining confidentiality of settlement discussions is consistent with the principles underlying the FOIA, Rule 408 of the FRE, Rule 26(b)(3) of the FRCP, and the work product doctrine. To encourage the use of ADR in negotiations, the recommendation contains a model rule seeking to protect the communications between the neutral and the parties or other participants in the course of the negotiations as well as the neutral's own notes and impressions. It does so in recognition that the mediator will virtually *never* have information or evidence that is not shared by at least one other person, excepting of course the neutral's own notes, recollections, and judgments. The rule does not address (1) when meetings or negotiations should be held in public session, (2) what justification should be prepared to support any agreement reached, or (3) what information should be available from a party to the negotiations. The rule covers oral communications or actions that are related to a settlement proceeding, as well as documents that are created specifically for the negotiations or other, previously existing documents that are furnished to the neutral in confidence by a participant in the negotiation. The restrictions on the neutral's disclosing information from the negotiation are not categorically absolute, being subject to several narrow exceptions that deal with extraordinary cases. Finally, the model rule does not attempt to impose

its terms on all parties for all issues; they would be free to vary the terms for their particular negotiations.

## **RECOMMENDATION**

1. Agencies that use the services of neutrals in settlement proceedings:

(a) should explicitly indicate that as a matter of policy they will not seek to discover or otherwise force disclosure of a neutral's notes, memoranda or recollections or of documents provided to the neutral in confidence in the course of settlement negotiations;

(b) in arranging with an individual or organization to serve as a neutral in settlement proceedings, should include a provision in any agreement with the neutral that (i) the agency makes no claim to the neutral's notes, memoranda or recollections or to documents provided to the neutral in confidence in the course of the settlement negotiations and (ii) that such material is outside the scope of the agency's right to any data developed pursuant to the agreement; and

(c) should adopt a procedural rule, consistent with the model rule contained in the appendix below, for all cases where the agency itself is a party to the negotiations or where private parties are negotiating the resolution of an issue in controversy concerning a statute, regulation, or policy administered by the agency.

2. The neutral, including a neutral (as defined in the model rule) who serves as a presiding officer, should carefully segregate, and identify as settlement documents, all materials received or developed during the course of a settlement proceeding, including any retained following its conclusion, so they will be used solely to assist the neutral in working to settle the issues in controversy.

3. Agencies should interpret the FOIA, Rule 408 of the Federal Rules of Evidence, Rule 26(b)(3) of the Federal Rules of Civil Procedure, and the work product doctrine to avoid disclosure of settlement communications by neutrals serving in administrative settlement proceedings.

## **APPENDIX**

### **Model Rule**

#### **xxx.1 Introduction; Encouraging Settlement; ADR Techniques**

(a) To facilitate a vigorous enforcement program and expeditious administrative decisionmaking, [the agency] encourages the resolution of issues in controversy through negotiations among the affected parties. Voluntary settlement processes within [the agency's] statutory

mandates and existing policies can produce decisions more efficiently than traditional procedures, and often yield decisions that are more effective than those reached without the concurrence of persons with firsthand involvement. Settlement agreements thereby enable the agency and the parties to accomplish their goals with expenditure of fewer resources.

(b) In addition to unassisted negotiations among the affected interests, alternative means of dispute resolution ("ADR") can aid the parties in reaching agreement in appropriate cases. These techniques include facilitation, mediation, minitrials, factfinding, and non-binding arbitration. In each, a neutral third party helps the parties reach a voluntary agreement. [The agency] encourages the use of these ADR processes as part of its policy favoring settlements.

(c) The voluntary settlement of issues in controversy through a dispute resolution process requires integrity, objectivity, and fairness on the part of the neutral and of the process itself. Moreover, the parties must feel free to discuss the dispute with the neutral without fear of being disadvantaged by the negotiations. [The agency] takes the position that the public policy favoring voluntary resolution of disputes therefore requires that the neutral not reveal, either voluntarily or through legal compulsion, information learned in confidence during the negotiations. To encourage the parties to negotiate, this rule enunciates an agency policy seeking to protect the confidentiality of settlement negotiations involving the neutral.

### **xxx.2 Definitions**

As used in this rule:

(a) "Issue in controversy" means a question that is material to a decision involving a statute, regulation, or policy administered by [the agency] about which persons who would be substantially affected or the agency disagree.

(b) "Settlement proceeding" means any process, such as facilitation, mediation, minitrial, factfinding, or non-binding arbitration, that is used to resolve issues in controversy by agreement of the parties in which a neutral serves, whether or not administrative or judicial proceedings have been instituted.

(c) "Neutral" means an individual who with respect to the issues in controversy--

(1) is not a party;

(2) does not have any official, financial, or personal conflict of interest unless such interest has been fully disclosed in writing and all parties agree that the individual may nevertheless serve as a neutral; and

(3) works to aid the parties in arriving at settlement of the issues in controversy through agreement.

(d) "Settlement communication" means any oral or written communication or conduct made in confidence and in connection with a settlement proceeding by any party, neutral, non-party participant, or other source of information relevant to the proceeding.

(e) "Settlement document" means any written material that is--

(1) prepared for the purpose of, in the course of, or pursuant to a settlement proceeding, including memoranda, notes, and work product of the neutral and the parties, or

(2) provided to the neutral in confidence for purposes of the settlement proceeding.

An agreement reached as a result of a settlement proceeding is not a settlement document unless the parties agree in writing, and the law allows, that it shall be regarded as such.

(f) "In confidence" means with the expressed desire of the source that the information be kept confidential or provided under circumstances that would create the reasonable expectation that it will not be disclosed.

(g) "Party" means a person or entity whose dispute is the subject of the settlement proceeding, including representatives of such a party.

(h) "Non-party participant" means a person or entity who is not a party to the dispute but who participates in the settlement proceeding, such as by providing information, analysis, advice, or views.

### **xxx.3 Applicability of the Rule**

(a) This rule applies to any settlement proceeding whether or not [the agency] is a party if the parties communicate with the neutral under circumstances that reasonably imply that the parties expect that the communications will be held confidential. Prior to beginning substantive negotiations, the parties may (1) agree that this rule does not apply to their negotiations or (2) modify the terms of this rule by agreement in which case that agreement will prevail to the extent it is authorized by law or is otherwise consistent with this rule. So that the neutral can decide whether he wishes to serve under those conditions, the parties shall so inform the neutral otherwise prior to commencing settlement proceedings. If they fail to do so, this rule shall apply.

(b) The provisions of the rule take effect when--

(1) a person has been specifically requested or accepted by at least one party to (i) serve as the neutral in the settlement proceeding, or (ii) discuss the potential of conducting a settlement proceeding, or (iii) contact other potential parties to determine whether it would be appropriate to convene a settlement proceeding to resolve the issues in controversy;

(2) the other parties with whom the neutral has contact knows that he or she is occupying the role of a neutral; and

(3) they communicate with the neutral in that capacity.

(c) The rule does not address--

(1) the extent to which a party may disclose settlement documents and communications either voluntarily or in response to discovery or legal process; or,

(2) the information that is required to support a decision or agreement reached in a settlement proceeding.

#### **xxx.4 Neutral Impartiality and Confidentiality of Settlement Negotiations**

(a) A neutral shall not voluntarily or through compulsory process disclose or testify concerning settlement communications or settlement documents, unless--

(1) all parties to the settlement proceeding and the neutral consent in writing, and if the settlement communication or document was provided by a non-party participant, that participant also consents in writing;

(2) the request is for a settlement document that was provided to the neutral in a public meeting or is otherwise already in the public domain;

(3) the settlement document is required by law to be made public, but only if it is not available from the person who prepared it or from any other source;

(4) a court determines that there is a need for such testimony or disclosure. The agency takes the position that any such determination should be pursuant to a finding that the need for disclosure to--(i) prevent a manifest injustice, (ii) reveal a violation of law, or (iii) protect the public health or safety is of sufficient magnitude in the particular case to outweigh the integrity of settlement proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential; or

(5) the settlement document or communication is relevant to the resolution of a dispute between the neutral and a party or participant, but only to the extent that the document or communication is used for purposes of resolving that dispute and not any issue in controversy in the settlement proceeding.

(b) If a demand, by way of discovery request or other legal process, is made for disclosure by the neutral of a settlement document or communication, the neutral shall make reasonable efforts to notify the parties and any affected non-party participant so that countermeasures may be taken if desired.

#### **xxx.5 Agency Records**

(a) The agency makes no claim of control or ownership over the notes, memoranda, and other work product prepared by a neutral or by his or her staff in connection with a settlement proceeding.

(b) The agency takes the position that settlement documents and communications are not agency records solely on account of their having been received by the neutral during a settlement proceeding; a document or other material that is otherwise an agency record remains as such.



*General Counsel, Federal Mediation and Conciliation Service Theodore M. Chaskelson greeting Justice Anthony Kennedy at plenary reception.*

1. As the influential Attorney General's *Manual on the Administrative Procedure Act* explained in 1947.

2. The settlement of cases and issues by informal methods is nothing new in Federal administrative procedure. In its Final Report, the Attorney General's Committee on Administrative Procedure pointed out . . . that "even where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process."

3. The Conference has repeatedly recommended that agencies employ ADR. Recommendation 86-3 calls on agencies to make greater use of mediation, facilitation, negotiation, minitrials, and other "ADR" methods to reduce the delay and contentiousness that accompany many agency decisions. E.g., *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR 305.86-3; *Alternatives for Resolving Government Contract Disputes*, 1 CFR 305.87-11; *Procedures for Negotiating Proposed Regulations*, 1 CFR 305.82-4, 85-5; *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR 305.84-4; *Resolving Disputes under Federal Grant Programs*, 1 CFR 305.82-2.

4. For brief definitions of these terms, see the Appendix to Conference Recommendation 86-3, *supra*.

5. See, e.g., Recommendation 88-5, *Agency Use of Settlement Judges*, 1 CFR 305.88-5.

**Statement 13**  
**Dispute Resolution Procedure in Reparations**  
**and Similar Cases** (*Adopted June 10, 1988*)

Where Congress has established private rights, effective means of protecting them are crucial. Congress has used a variety of procedures to protect consumers, workers and certain others. In many cases, it has established formal adjudicatory processes (e.g., within regulatory agencies like the Federal Trade Commission or review agencies like the Occupational Safety and Health Review Commission). Congress has also recognized that, in many cases, formal agency hearings or court litigation may be unnecessary or too costly. Thus, alternative or supplementary agency procedures or even private-sector procedures have been established to resolve disputes that formerly would have been left to the formal adjudication process.

Agencies' use and oversight of these dispute processes has become even more important in light of recent congressional developments and Supreme Court decisions. The Supreme Court recognized in *Shearson/American Express, Inc. v. McMahon*, 107 Sup. Ct. 2332 (1987), for example, that arbitration processes are often adequate to protect statutory rights, particularly where an agency can oversee their operation to ensure their adequacy. Indeed, that case enforced an arbitration agreement even for a treble damage case brought under the Racketeer Influenced and Corrupt Organizations Act by a plaintiff acting much like a "private attorney general."

Agencies' approaches to "reparations" and similar programs to safeguard consumers reflect the diversity of approaches that are available. The Securities and Exchange Commission, so far at least, has relied on a purely private resolution mechanism--exchange-based arbitration. The Commodity Futures Trading Commission ("CFTC"), has developed, pursuant to statutory mandate, its own distinctive dispute resolution program. Since it was formed in 1974, the CFTC has administered a "reparations" program that adjudicates between commodity futures salespersons (known as "futures commission merchants") and aggrieved customers.

The CFTC's program provides an interesting alternative to civil litigation, formal hearings under the Administrative Procedure Act, and commercial arbitration. Like arbitration (which is also an option available to aggrieved customers), the reparations program uses decisionmakers familiar with the industry from which the disputes arise. But these decisionmakers are CFTC employees, rather than arbitrators drawn from industry--either agency administrative law judges or other specially-designated agency employees known as "judgment officers".

The CFTC has been creative in fashioning procedures for the reparations program. The "formal" procedure, for claims of more than \$10,000, is akin to the adjudicatory procedure provided in Section 554 of the APA. The "summary" procedure for claims under \$10,000 dispenses with several formalities, including the right to an oral hearing. It does permit a telephonic hearing. A third, "voluntary" procedure, is available for claims of any size and must be elected by both parties. It dispenses with a written opinion by the presiding judgment officer and appeal rights. While the CFTC's program had a troubled early history, characterized at times by crippling case backlogs and severe budgetary constraints, recent years have seen enhanced resources and a considerable improvement in case management.

The Administrative Conference has begun exploring these processes with its research into the CFTC's innovative approach to consumer protection. The Conference sees important benefit in programs, like the CFTC's, that offer complainants procedural options. Creation of an agency review process for consumer complaints benefits the regulatory agency because the process provides a valuable pipeline into the problems of the industry; resolving these complaints serves as a constant challenge and impetus to the agency to interpret its statutory mandate. A three-tiered approach like the CFTC's permits added opportunities for procedural tailoring. On the other hand, the parallel private decisional process may be less expensive, faster, and more responsive. Parties benefit from having both a choice of forums and an opportunity to select a dispute resolution procedure that suits their needs.

Much remains to be done in considering the best approach for particular agencies, and this statement is intended as an initial foray. The Administrative Conference suggests that continued experimentation with alternative types of procedures for resolving issues arising in consumer protection programs is justified. Agencies administering statutes that recognize a private right of action should consider establishing, or seeking authority to establish, a reparations program offering creative procedures for "formal," "summary" and "voluntary" dispute resolution, along the lines of the CFTC's where:

(1) An agency statute provides for and engenders substantial private litigation and/or arbitration; or

(2) An agency regulatory program centers on a single industry or group of similar industries, such as would permit creation of "expert" decisionmakers.

An agency with both of the characteristics listed above would be a prime candidate for a reparations program. Each program of course would be crafted to meet the special needs of the agency's particular regulatory jurisdiction.

Management of reparations programs should take into account these factors:

(1) Where complaints are to be resolved by summary or voluntary procedures, the discovery process should be streamlined to comport with the goals of less formal procedures. For example, the number of interrogatories and requests for admissions may be substantially limited; and summary information rather than facsimilies could be deemed responsive to requests for the production of documents.

(2) The judgment officers used in summary and voluntary procedures need not always be administrative law judges or even attorneys, so long as they demonstrate sufficient experience in, or knowledge of, the regulated industry or applicable law.

(3) While summary procedures by their nature may not require an in-person hearing, telephone hearings may provide a useful and inexpensive way of allowing the judgment officer to question parties and witnesses. Telephone hearings should be available whenever a judgment officer believes such a hearing is appropriate to the resolution of a dispute.

(4) Since complainants in reparations proceedings frequently appear without a lawyer, agencies should make the dispute resolution process understandable to the lay person. Toward that end, notices and descriptions of the process should avoid whenever possible the use of legal terms (e.g., "pleadings" or "discovery") where a colloquial term will suffice. Where use of a lay term would mislead, or where no appropriate term is available agencies should make every effort to ensure that the legal term of art has been translated for the lay party or even provide a glossary of such terms for the benefit of the lay reader.

(5) Managers should ensure that a sufficient number of judgment officers are employed to reduce the overall processing time for summary and voluntary proceedings, and thus to permit those forms of procedure to fulfill their promise.

(6) Case tracking systems for reparations cases should be used, or modernized, so that the location and progress of any case can be quickly identified and bottlenecks eliminated.

## APPENDIX F - CONFERENCE PUBLICATIONS

The following materials published by the Office of the Chairman are sold by the U.S. Government Printing Office. Call (202)783-3238 to reach the order desk at the Government Printing Office. Orders may be charged to VISA, Master Charge or GPO Deposit Account.

SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION, available from the Government Printing Office (Stock Number 052-003-01070-4) for \$31.00, was produced in 1987. This volume includes information on ADR in general, specific dispute resolution techniques, federal agency policies and practices, various forms and procedures, and implementation considerations.

AGENCY ARBITRATION, CONSTITUTIONAL AND STATUTORY ISSUES, Studies in Administrative Law and Procedure 88-1, available from the Government Printing Office (Stock Number 052-003-01135-2) for \$5.50. This is the first in the Conference's series. It contains reports by Harold H. Bruff and Richard K. Berg; the text of recommendations 86-3 and 87-5; the text of S. 2274; and Marshall J. Breger's testimony before the House Judiciary Committee; and a copy of a brochure describing the Conference's role with ADR.

Reprints of an indexed bibliography [*Administrative Conference of the United States: A Bibliography 1968-1986*, 39 ADMINISTRATIVE LAW REVIEW 245 (Spring 1987)] are available upon request from the Office of the Chairman. The following list includes agency sponsored reports and articles printed during 1988:

ADMINISTRATIVE CONFERENCE OF THE U. S. (OFFICE OF THE CHAIRMAN), AGENCY ARBITRATION. Washington, D.C., U. S. Government Printing Office (1988).

ADMINISTRATIVE CONFERENCE OF THE U. S. (OFFICE OF THE CHAIRMAN), FEDERAL USER FEES: PROCEEDINGS OF A SYMPOSIUM, Edited by Thomas D. Hopkins. Washington, D.C., U. S. Government Printing Office (1988).

Aman, Alfred C., Jr., *Implementing the Bank Holding Company Act: The Adjudicatory Procedures and Informal Bargaining Processes of the Federal Reserve Board*, 1988 ACUS 189.

Recommendation 88-3: "The Federal Reserve Board's Handling of Applications Under the Bank Holding Company Act," 1 C.F.R. 305.88-3.

Anthony, Robert A., *Which Agency Interpretations Should Get Judicial Deference?--A Preliminary Inquiry*, 40 ADMIN. L. REV. 121 (1988).

Baxter, Lawrence G., *Life in the Administrative Track: Administrative Adjudication of Claims Against Savings Institution Receiverships*, 1988 ACUS 409; update and modification, 1988 DUKE L. J. 422 (1988).

Recommendation 88-8: "Resolution of Claims Against Savings Receiverships," 1 C.F.R. 305.88-8.

Breger, Marshall J., *Broadcast Deregulation: The Reagan Years and Beyond*, 40 ADMIN. L. REV. 345 (1988).

Bruff, Harold H., *Presidential Management of Agency Rulemaking*, 1988 ACUS 527.

Recommendation 88-9: "Presidential Review of Agency Rulemaking," 1 C.F.R. 305.88-9.

Fidell, Eugene R., *Federal Protection of Private Sector Health and Safety Whistleblowers*, 2 ADMIN. L. J. 1 (1988); 134 Cong. Rec. S1447 (daily ed., Feb. 23, 1988); 1987 ACUS 219.

Recommendation 87-2: "Federal Protection of Private Sector Health and Safety Whistleblowers," 1 C.F.R. 305.87-2.

Gillette, Clayton P. and Hopkins, Thomas D., *Federal Agency Valuations of Human Life*, 1988 ACUS 367.

Recommendation 88-7: "Valuation of Human Life in Regulatory Decisionmaking," 1 C.F.R. 305.88-7.

Grad, Frank P., *Contractual Indemnification of Government Contractors*, 1988 ACUS 103.

Recommendation 88-2: "Federal Government Indemnification of Government Contractors," 1 C.F.R. 305.88-2.

Graham, Heather G., *New Effort Focuses on Role of Contracting Officer in Deciding Disputes*, 28 CONT. MGMT. 14 (August, 1988).

Grunewald, Mark H., *Administrative Mechanisms for Resolving Freedom of Information Act Disputes*, 40 ADMIN. L. REV. 1 (1988); 1987 ACUS 1341.

Statement 12: "Statement on Resolution of Freedom of Information Act Disputes," 1 C.F.R. 310.12.

Harter, Philip J., *Neither Cop nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 1988 ACUS 839.

Recommendation 88-11: "Encouraging Settlements by Protecting Mediator Confidentiality," 1 C.F.R. 305.88-11.

Harter, Philip J., *Standards of Conduct for Presidential Transition Workers*, 1988 ACUS 77.

Recommendation 88-1: "Presidential Transition Workers' Code of Ethical Conduct," 1 C.F.R. 305.88-1.

Hostetler, Zona Fairbanks, *Nonlawyer Assistance to Individuals in Federal Mass Justice Agencies: The Need for Improved Guidelines*, 2 ADMIN. L. J. 85 (1988); 1986 ACUS 47.

Recommendation 86-1: "Nonlawyer Assistance and Representation," 1 C.F.R. 305.86-1.

Joseph, Daniel and Gilbert, Michelle L., *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, 1988 ACUS 281.

Recommendation 88-5: "Agency Use of Settlement Judges," 1 C.F.R. 305.88-5.

Legomsky, Stephen H., *A Research Agenda for Immigration Law: A Report to the Administrative Conference of the United States*, 25 SAN DIEGO L. REV. 227 (1988), revision of 1985 ACUS 505.

Recommendation 85-4: "Administrative Review in Immigration Proceedings," 1 C.F.R. 305.85-4.

Luneburg, William V., *Petitions for Rulemaking: Federal Agency Practice and Recommendations for Improvement*, 1988 WIS. L. REV. 1 (1988); 1986 ACUS 493.

Recommendation 86-6: "Petitions for Rulemaking," 1 C.F.R. 305.86-6.

Macey, Jonathan R. and Miller, Geoffrey P., *Bank Failures, Risk Monitoring, and the Market for Bank Control*, 88 COLUM. L. REV. 1153 (1988).

Malloy, Michael P., *Balancing Public Confidence and Confidentiality: Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies*, 61 TEMP. L. REV. 723 (1988), revision of 1987 ACUS 1215.

Recommendation 87-12: "Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies," 1 C.F.R. 305.87-12.

Perritt, Henry H., Jr., *Electronic Acquisition and Release of Federal Agency Information*, 1988 ACUS 601.

Recommendation 88-10: "Federal Agency Use of Computers in Acquiring and Releasing Information," 1 C.F.R. 305.88-10.

Sargentich, Thomas O., *Jurisdictional Debate in Administrative Law: A Comment on Telecommunications Research and Action Center v. FCC*, 1988 ACUS 309.

Recommendation 88-6: "Judicial Review of Preliminary Challenges to Agency Action," 1 C.F.R. 305.88-6.

Smith, Stuart A., *Deferred Taxation of Gains Realized Upon Divestiture of Property To Avoid Conflicts of Interest*, 1988 ACUS 273.

Recommendation 88-4: "Deferred Taxation for Conflict-of-Interest Divestitures," 1 C.F.R. 305.88-4.

Smythe, Marianne K., *The Reparations Program at the Commodity Futures Trading Commission: Reducing Formality in Agency Adjudication*, 2 ADMIN. L. J. 39 (1988); 1988 ACUS 873.

Statement 13: "Dispute Resolution Procedure in Reparations and Similar Cases," 1 C.F.R. 310.13.



*Attentive membership at special plenary session in September.*

# APPENDIX G - BYLAWS OF THE ADMINISTRATIVE CONFERENCE

## TITLE 1, CODE OF FEDERAL REGULATIONS, PART 302\*

### **302.1 Establishment and Objective**

The Administrative Conference Act, 5 U.S.C. 571 *et seq.*, 78 Stat. 615 (1964), authorized the establishment of the Administrative Conference of the United States as a permanent, independent agency of the federal government. The purpose of the Administrative Conference is to improve the administrative procedure of federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest. The Administrative Conference Act provides for the membership, organization, powers, and duties of the Conference.

### **302.2 Membership**

#### **(a) General**

(1) Each member is expected to participate in all respects according to his own views and not necessarily as a representative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(2) Each member is expected to devote personal and conscientious attention to the work of the Conference and to attend plenary sessions and committee meetings regularly. When a member has failed to attend two consecutive Conference functions, either plenary sessions, committee meetings, or both, the Chairman shall inquire into the reasons for the non-attendance. If not satisfied by such reasons, the Chairman shall: (i) in the case of a government member, with the approval of the

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\*As revised December 30, 1986.

Council, request the head of the appointing agency to designate a member who is able to devote the necessary attention, or (ii) in the case of a non-government member, with the approval of the Council, terminate the member's appointment, provided that where the Chairman proposes to remove a non-government member, the member first shall be entitled to submit a written statement to the Council. The foregoing does not imply that satisfying minimum attendance standards constitutes full discharge of a member's responsibilities, nor does it foreclose action by the Chairman to stimulate the fulfillment of a member's obligations.

(b) Terms of Non-Government Members

Non-government members are appointed by the Chairman with the approval of the Council. One-half of the non-government memberships shall be filled by appointments made on or after July 1 of each year, and each term will expire on June 30 of the second year thereafter. To avoid shortening the term of any non-government member in service as of the effective date of this paragraph, the Chairman shall, by random selection, designate one-half of the non-government members to serve terms terminating on June 30, 1988, and the other half to serve terms terminating on June 30, 1989. No non-government members, other than senior fellows, shall at any time be in continuous service beyond four full terms.

(c) Eligibility and Replacements

(1) A member designated by a federal agency shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he leaves the service of the agency or department. Designations and re-designations of members shall be filed with the Chairman promptly.

(2) A person appointed as a non-government member shall become ineligible to continue in that capacity if he enters full-time government service. In the event a non-government member of the Conference resigns or become ineligible to continue as a member, the appointing authority shall appoint a successor for the remainder of the term.

(d) Alternates

Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, a suitably informed alternate may be permitted, with the approval of a committee, to participate for a member in a meeting of the committee, but such alternate shall not have the privilege of a vote in respect to any action of the committee. Use of an alternate does not lessen the obligation of regular personal attendance set forth in paragraph (a)(2) of this section.

(e) Senior Fellows

The Chairman may, with the approval of the Council, appoint persons who have served as members of the Conference for eight or more years, or former Chairmen of the Conference, to the position of senior fellow. The terms of senior fellows shall terminate at 2-year

intervals from June 30, 1970. Senior fellows shall have all the privileges of members, but may not vote.

### **302.3 Committees**

The Conference shall have the following standing committees:

1. Committee on Adjudication;
2. Committee on Administration;
3. Committee on Governmental Processes;
4. Committee on Judicial Review;
5. Committee on Regulation; and
6. Committee on Rulemaking.

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

### **302.4 Liaison Arrangements**

The Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the judiciary, federal agencies which are not represented on the Conference, and professional associations. Persons appointed under these arrangements may participate in the activities of a designated committee without vote, and may participate in the deliberations of the Conference with privileges of the floor, but without vote.

### **302.5 Avoidance of Conflicts of Interest**

(a) Disclosure of Interests

(1) Non-government members (including senior fellows) may be deemed to be special government employees within the meaning of 18 U.S.C. 202 and subject to the provisions of sections 201-224 of title 18 United States Code, in accordance with their terms. The Chairman of the Conference is authorized to prescribe requirements for the filing of statements of employment and financial interests necessary to comply with part III of Executive Order 11,222, as amended, or any successor presidential or statutory requirement. Without conceding the correctness of the view that non-government members are special government employees, the Conference has chosen to adopt the bylaw provisions that follow in order to eliminate whatever uncertainties might otherwise exist concerning the propriety of participation in Conference proceedings.

(2) In addition to complying with any requirement prescribed by statute or executive order, each member, public or governmental, shall, upon appointment to the Conference and annually thereafter, file a brief general statement describing the nature of his or her practice or affiliations, including, in the case of a member of a partnership, a general

statement about the nature of the business or practice of the partnership, to the extent that such business, practice, or affiliations might reasonably be thought to affect the member's judgment on matters with which the Conference is concerned. (For example, a member might state that he or she represents employers or unions before the National Labor Relations Board, broadcasters before the Federal Communications Commission, or consumer groups before agencies and courts.) The Chairman will include with the agenda for each plenary session a statement calling to the attention of the members the requirements of this section. Each member who believes the content of the agenda calls for disclosure additional to that already on file will file an amended statement concerning his or her interests. Current statements of all members will be open to public inspection at the Office of the Chairman and will be readily available at any plenary session. Except as provided in paragraph (b), members may vote or participate in matters before the Conference without additional disclosure of interest.

(b) Disqualifications

(1) In accordance with 18 U.S.C. 208 a member shall not, except as provided in paragraphs (b)(2) or (3) of this section, vote or otherwise participate as a member in the disposition of any particular matter of Conference business, including the adoption of recommendations and other statements, in which, to his or her knowledge, the member has a financial interest. For purposes of this paragraph (b) a member is deemed to have a financial interest in any particular matter in which the member, the member's spouse, minor child, partner, organization in which the member is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he or she is negotiating or has any arrangement concerning prospective employment, has a financial interest.

(2) Notwithstanding paragraph (b)(1) of this section, a member may, at any stage of Conference consideration and without further disclosure, participate and vote on a proposed recommendation or other Conference statement or action relating to the procedure of any federal agency or agencies, where the Conference action is not directed to and is unlikely to affect the substantive outcome of any pending judicial matter or administrative proceeding involving a specific party or parties (other than the United States) in which to his knowledge he has a financial interest. The Conference determines pursuant to 18 U.S.C. 208(b) that in such a case any financial interest which the member may have in the matter before the Conference is too remote to affect the integrity of the member's service to the Conference.

(3) Where a member believes that he or she is or may be disqualified from participating in the disposition of a matter before the Conference under the provisions of this subsection, the member may advise the Chairman of the reason for his or her possible disqualification,

including a full disclosure of the financial interest involved. If the Chairman determines in writing pursuant to 18 U.S.C. 208(b) that the interest is not so substantial as to be likely to affect the integrity of the member's service to the Conference, the member may, upon receipt of such determination, vote and otherwise participate in the disposition of the matter.

## **302.6 General**

### **(a) Meetings**

All sessions of the Assembly shall be open to the public. Privileges of the floor, however, extend only to members of the Conference, to senior fellows, to liaison representatives, to consultants and staff members insofar as matters on which they have been engaged are under consideration, and to persons who, prior to the commencement of the meeting, have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly.

### **(b) Quorums**

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council.

### **(c) Separate Statements**

(1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation in the FEDERAL REGISTER. A member's failure to file or join in such a separate statement does not necessarily indicate his agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the Executive Secretary not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause.

### **(d) Amendment of Bylaws**

The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

### **(e) Procedure**

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.

# **APPENDIX H - THE ADMINISTRATIVE CONFERENCE ACT**

## **TITLE 5, UNITED STATES CODE, CHAPTER 5**

### **Subchapter III--Administrative Conference of the United States\***

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#### **571. Purpose**

It is the purpose of this subchapter to provide suitable arrangements through which federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other federal responsibilities may be carried out expeditiously in the public interest.

#### **572. Definitions**

For the purpose of this subchapter--

(1) "administrative program" includes a federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter, except that it does not include a military or foreign affairs function of the United States;

(2) "administrative agency" means an authority as defined by section 551(1) of this title; and

(3) "administrative procedure" means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action,

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\*Public Law 88-499, August 30, 1964, 78 Stat. 615; as codified by Public Law 89-554, September 6, 1966, 80 Stat. 388-390; as amended by Public Law 92-526, Section 1, October 21, 1972, 86 Stat. 1048; as amended by Public Law 97-258 3(a)(1), September 13, 1982, 96 Stat. 1062; as amended by Public Law 99-170, October 11, 1986, 100 Stat. 1198.

and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

### **573. Administrative Conference of the United States**

(a) The Administrative Conference of the United States consists of not more than 101 nor less than 75 members appointed as set forth in subsection (b) of this section.

(b) The Conference is composed of--

(1) a full-time Chairman appointed for a 5-year term by the President, by and with the advice and consent of the Senate. The Chairman is entitled to pay at the highest rate established by statute for the chairman of an independent regulatory board or commission, and may continue to serve until his successor is appointed and has qualified;

(2) the chairman of each independent regulatory board or commission or an individual designated by the board or commission;

(3) the head of each executive department or other administrative agency which is designated by the President, or an individual designated by the head of the department or agency;

(4) when authorized by the Council referred to in section 575(b) of this title, one or more appointees from a board, commission, department, or agency referred to in this subsection, designated by the head thereof with, in the case of a board or commission, the approval of the board or commission;

(5) individuals appointed by the President to membership on the Council who are not otherwise members of the Conference; and

(6) not more than 40 other members appointed by the Chairman, with the approval of the Council, for terms of 2 years, except that the number of members appointed by the Chairman may at no time be less than one-third nor more than two-fifths of the total number of members. The Chairman shall select the members in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to federal administrative procedure.

(c) Members of the Conference, except the Chairman, are not entitled to pay for service. Members appointed from outside the federal government are entitled to travel expenses, including per diem instead of subsistence, as authorized by section 5703 of this title for individuals serving without pay.

### **574. Powers and Duties of the Conference**

To carry out the purpose of this subchapter, the Administrative Conference of the United States may--

(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out admin-

istrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;

(2) arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure; and

(3) collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure.

## **575. Organization of the Conference**

(a) The membership of the Administrative Conference of the United States meeting in plenary session constitutes the Assembly of the Conference. The Assembly has ultimate authority over all activities of the Conference. Specifically, it has the power to--

(1) adopt such recommendations as it considers appropriate for improving administrative procedure. A member who disagrees with a recommendation adopted by the Assembly is entitled to enter a dissenting opinion and an alternate proposal in the record of the Conference proceedings, and the opinion and proposal so entered shall accompany the Conference recommendation in a publication or distribution thereof; and

(2) adopt bylaws and regulations not inconsistent with this subchapter for carrying out the functions of the Conference, including the creation of such committees as it considers necessary for the conduct of studies and the development of recommendations for consideration by the Assembly.

(b) The Conference includes a Council composed of the Chairman of the Conference, who is Chairman of the Council, and 10 other members appointed by the President, of whom not more than one-half shall be employees of federal regulatory agencies or executive departments. The President may designate a member of the Council as Vice Chairman. During the absence or incapacity of the Chairman, or when that office is vacant, the Vice Chairman shall serve as Chairman. The term of each member, except the Chairman, is 3 years. When the term of a member ends, he may continue to serve until a successor is appointed. However, the service of any member ends when a change in his employment status would make him ineligible for Council membership under the conditions of his original appointment. The Council has the power to--

(1) determine the time and place of plenary sessions of the Conference and the agenda for the sessions. The Council shall call at least one plenary session each year;

(2) propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Assembly;

(3) make recommendations to the Conference or its committees on a subject germane to the purpose of the Conference;

(4) receive and consider reports and recommendations of committees of the Conference and send them to members of the Conference with the views and recommendations of the Council;

(5) designate a member of the Council to preside at meetings of the Council in the absence or incapacity of the Chairman and Vice Chairman;

(6) designate such additional officers of the Conference as it considers desirable;

(7) approve or revise the budgetary proposals of the Chairman; and

(8) exercise such other powers as may be delegated to it by the Assembly.

(c) The Chairman is the chief executive of the Conference. In that capacity he has the power to-

(1) make inquiries into matters he considers important for Conference consideration, including matters proposed by individuals inside or outside the federal government;

(2) be the official spokesman for the Conference in relations with the several branches and agencies of the federal government and with interested organizations and individuals outside the government, including responsibility for encouraging federal agencies to carry out the recommendations of the Conference;

(3) request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law;

(4) recommend to the Council appropriate subjects for action by the Conference;

(5) appoint, with the approval of the Council, members of committees authorized by the bylaws and regulations of the Conference;

(6) prepare, for approval of the Council, estimates of the budgetary requirements of the Conference;

(7) appoint and fix the pay of employees, define their duties and responsibilities, and direct and supervise their activities;

(8) rent office space in the District of Columbia;

(9) provide necessary services for the Assembly, the Council, and the committees of the Conference;

(10) organize and direct studies ordered by the Assembly or the Council, to contract for the performance of such studies with any public or private persons, firm, association, corporation, or institution under title III of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 251-260), and to use from time to time, as appropriate, experts and consultants who may be employed in accordance with section 3109 of this title at rates not in excess of the maximum rate of pay for grade GS-15 as provided in section 5332 of this title;

(11) utilize, with their consent, the services and facilities of federal agencies and of state and private agencies and instrumentalities with or without reimbursement;

(12) accept, hold, administer, and utilize gifts, devises, and bequests of property, both real and personal, for the purpose of aiding and facilitating the work of the Conference. Gifts and bequests of money and proceeds from sales of other property received as gifts, devises, or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the Chairman. Property accepted pursuant to this section, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gifts, devises, or bequests. For purposes of federal income, estate, or gift taxes, property accepted under this section shall be considered as a gift, devise, or bequest to the United States;

(13) accept voluntary and uncompensated services, notwithstanding the provisions of section 1342 of Title 31;

(14) on request of the head of an agency, furnish assistance and advice on matters of administrative procedure; and

(15) exercise such additional authority as the Council or Assembly delegates to him.

The Chairman shall preside at meetings of the Council and at each plenary session of the Conference, to which he shall make a full report concerning the affairs of the Conference since the last preceding plenary session. The Chairman, on behalf of the Conference, shall transmit to the President and Congress an annual report and such interim reports as he considers desirable.

#### **576. Authorization of Appropriations**

There are authorized to be appropriated to carry out the purposes of this subchapter not more than \$1,600,000 for fiscal year 1986 and not more than \$2,000,000 for each fiscal year thereafter up to and including fiscal year 1990. Of any amounts appropriated under this section, not more than \$1000 may be made available in each fiscal year for official reception and entertainment expenses for foreign dignitaries.

